MISSISSIPPI LAW JOURNAL

ENTERS A STRANGER TO THE COMMON LAW—
CRIMINAL DISCOVERY

Neal Biggers, Jr.

UNION SECURITY AGREEMENTS IN THE
PUBLIC SERVICE: AN EVALUATION

Daniel P. Sullivan

THE SOCIAL SECURITY ADMINISTRATION VERSUS
THE LAWYERS . . . AND POOR PEOPLE TOO—PART II

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STATE BAR SECTION: NATURALIZATION AND
LAW DAY SPEECH

Fred B. Smith

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ENTERS A STRANGER TO THE COMMON LAW—CRIMINAL DISCOVERY

*Neal Biggers, Jr.**

> "The right of discovery in criminal cases is not recognized at common law—and unless introduced by legislation is a complete and utter stranger to criminal procedure." (Walker v. People)[1]

In both England and the United States, history supports the above pronouncement of Justice Clark. In a criminal case in 1792 the King's Bench considered a defense motion that the defendant be allowed to examine, prior to trial, statements given to the prosecution by prospective witnesses. In refusing to order such statements delivered to the defendant for examination, Lord Kenyon, Chief Justice, expressed clearly the state of the law in England at that time:

> I am extremely clear that we ought not to grant this application. There is no precedent or principle to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law.[2]

In the treason charge against Aaron Burr in 1807, the defense filed a motion prior to trial that it be allowed to inspect a certain letter in the possession of the United States which allegedly related to the treasonous conduct of Burr. Chief Justice Marshall denied the motion of the defendant on the grounds that to order such a discovery of the prosecution's evidence by the defendant was beyond the power of the court. The famed jurist left no doubt that the opinion of the court was that the defendant in a criminal case has no right to examine all documents in the possession of the prosecution prior to trial.

> Different representations may have been made by the witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although

* District Attorney, First Judicial District of Mississippi.

1 Walker v. People, 126 Colo. 135, 248 P.2d 287, 302 (1952).

2 Rex v. Holland, 4 T.R. (Dunford & East), 100 Eng. Reports 1248, 1249 (1792).

> before the case be opened, its particular application cannot be perceived by the judge.[3]

Subsequent to the Holland case in England and the Burr case in this country, the courts have been consistent in holding that the discovery rights of a defendant in a criminal case are considerably more limited than in a civil case.[4] The reasoning of the courts in following separate guidelines in civil and criminal discovery proceedings is well documented.[5]

Discovery of the opposing party's evidence has been found to be advantageous to the administration of justice in civil cases because it narrows the issues,[6] shortens the trial,[7] and lessens the disadvantage of surprise in a one-shot presentation of evidence,[8] which is the nature of a jury trial. These advantages of discovery might at first glance also seem to be applicable in criminal cases; but generally the courts have found that such is not the case.[9] Courts have expressed the opinion that, contrary to lending itself to honest fact-finding, liberal discovery in criminal proceedings has been found to promote perjury, suppression of evidence, and threats and violence against state's witnesses.[10] When a defendant in a criminal case, as opposed to a civil proceeding, has at stake his freedom and often his very life, the dangers of attempts by him to defeat justice by whatever means available, cannot be said not to exist. Experience has shown that it is not unheard of for a defendant in a criminal case, knowing the state's case against him, to procure perjured testimony to create a false defense.[11] If the defendant knows the names of all the prosecution witnesses, bribes or threats aimed at inducing perjured testimony or the witness's unavailability for testimony are documented.[12]

The problem also should be considered in light of the defendant's statutory and constitutional protections against self-incrimination. The State has no right whatever to demand inspection of any of the defendant's documents, to take his deposition, or submit interrogatories to him.

In considering the question of the accused's rights to know prior to trial substantial portions of the state's evidence, Judge Learned Hand wrote the following opinion:

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[3] U.S. v. Burr, 25 F. Cas. 187, 191 (C.C. Va. 1807).

[4] *See, e.g.*, People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

[5] *E.g.*, State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

[6] *Id.* at 884.

[7] Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[8] *Id.*

[9] State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

[10] *Id.*

[11] *Id.*

[12] *Id.*

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstruct, delay, and defeat the prosecution of crime.[13]

Notwithstanding the inherent threats to honest fact-finding which criminal discovery imposes, widening views toward more access by the defendant to the state's case are being heard in the state and federal courts. To support claims of the defendant's right to know certain aspects of the prosecution's case prior to trial, defense motions rely on arguments ranging from the discretionary power of the court to administer justice, to the constitutional rights of the defendant. The Supreme Court has held on at least two occasions that though the trial courts may order discovery in certain areas of criminal cases relying on the sound discretion of the courts, pre-trial inspection is not constitutionally assured.[14]

In *Leland v. Oregon*[15] the Court held that the procedures which a state follows in its administration of criminal trials is not a denial of due process if it is a policy that does not violate "generally accepted concepts of basic standards of justice."[16] A state or federal procedure which refuses a defendant in a criminal case the right to examine the state's evidence prior to trial would not seem to violate "accepted standards of justice," as it has been the common practice for at least 145 years.[17]

In *Cicenia v. LeGay*[18] the defendant pled guilty to murder and subsequently claimed his guilty plea was actuated by the existence of a confession which the prosecution held but would not allow the defendant to examine prior to entering a plea. The defendant had filed a motion with the trial court to order the state to allow the defendant to examine

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[13] U.S. v. Garrison, 291 F. 646 (S.D. N.Y. 1923).

[14] Cicenia v. LeGay, 357 U.S. 504 (1958); Leland v. Oregon, 343 U.S. 790 (1952).

[15] Leland v. Oregon, 343 U.S. 790 (1952).

[16] *Id.* at 799.

[17] *See, e.g.*, notes 1 and 3 *supra.*

[18] Cicenia v. LeGay, 357 U.S. 504 (1958).

the confession prior to entering a plea. The court denied the motion. The Supreme Court held that the defendant does not have a constitutional right to inspect a confession prior to entering a plea where the state rule of procedure is that the trial court has discretion to allow such an inspection prior to trial or not;[19] and this procedure was not in violation of "accepted standards of justice."

Again, in *Palermo v. U.S.*[20] in ruling on the constitutionality of a federal statute dealing with federal rules for criminal discovery,[21] the Court re-emphasized that the examination of statements made by prosecution witnesses is generally an area of procedure and not constitutionality:

> The statute as interpreted does not reach any constitutional barrier. Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power.[22]

It is generally considered, however, that if the prosecution has in its possession evidence which would exculpate or tend to exculpate the defendant, to withhold such evidence upon being asked for it, would violate the traditional concepts of the basic standards of justice and thus reach constitutional grounds.[23]

In surveying the procedures that have been developed in the state and federal courts in ruling on motions for discovery by the defendant in criminal cases, the decisions, when analyzed, have distinguished the discovery available to the defendant prior to trial and those avenues of discovery available during trial.

Information Available to Defendant Prior To Trial in Federal Courts

The pre-trial role of criminal discovery in the federal courts is largely statutory and conditioned upon the discretion of the trial judge as a result of legislation passed in reaction to the *Jencks* case,[24] in which the Supreme Court required the government to deliver for inspection by the defendant prior to trial statements obtained from prospective prose-

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[19] *Id.* at 510.

[20] 360 U.S. 343 (1959).

[21] 18 U.S.C.A. § 3500 (Supp. 1967).

[22] 360 U.S. at 353.

[23] *See* Brady v. Maryland, 373 U.S. 83 (1963), Williams v. Dutton, No. 25349 (5th Cir., Aug. 20, 1968).

[24] Jencks v. U.S., 353 U.S. 657 (1957).

cution witnesses. The Congress passed legislation[25] controlling the procedure for the examination by the defendant of such statements procured by the prosecution. The Federal Rules of Criminal Procedure[26] also give the defendant the statutory right to examine prior to trial certain tangible evidence in the possession of the prosecution, and it has been held that the materials subpoenaed by the defendant do not actually have to be used in evidence to be brought under the privilege of inspection by the defendant.[27]

Information Available to Defendant Prior To Trial in State Courts

While the statutory and court-made procedures controlling criminal discovery vary widely from state to state, the general rule that, unless discovery rules are prescribed by statute, the area is subject to the discretion of the court as long as it does not reach constitutional barriers, is uniformly recognized.

The granting by the court of the authority to inspect, prior to trial, the documents or objects in the possession of the prosecution is usually influenced by the probative value of the information sought by the defense motion.

Since confessions are highly probative in value, their discoverability has been held by at least one state to be a constitutional right of the defendant;[28] however other jurisdictions have denied the defendant the right to inspect any confessions,[29] and the Supreme Court would likely uphold such a procedure as to constitutionality.[30] The matter has been taken out of the discretion of the court in some states and made a statutory right of the defendant;[31] however in most jurisdictions the right of discovery of confessions is still within the discretion of the trial court.[32] In at least one state, a civil discovery statute[33] has been held to

Miss.

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[25] 18 U.S.C.A. § 3500 (Supp. 1967).

[26] *See, e.g.*, Fed. R. Crim. P. 16, 17.

[27] Bowman Dairy Co. v. United States, 341 U.S. 214 (1951).

[28] State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945); *accord* State v. Haas, 188 Md. 63, 51 A.2d 647 (1947).

[29] *E.g.*, Commonwealth v. Chapin, 33 Mass. 610, 132 N.E.2d 404 (1956), *cert. denied* 352 U.S. 857 (1956).

[30] See *supra* note 14.

[31] *E.g.*, Ill. Ann. Stat. Ch. 38, § 114-10 (Smith-Hurd 1964); Florida Rules of Criminal Procedure, 1.220(a) (effective Jan. 1, 1968).

[32] *E.g.*, State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); Powell v. Superior Court, 48 Cal. 2d 704, 312 P. 2d. 698 (1957). *See generally* 3 Wigmore, Evidence, §§ 850-855.

[33] Miss. Code Ann. § 1659, (1942).

probably cloak the defendant with the statutory right to examine prior to trial confessions made by him.[34]

Although the defendant would usually desire to know the names of the witnesses who gave to the grand jury the testimony leading to his indictment, and those who will testify against him at the trial of his case, such a right is not generally recognized as existing, possibly due to the threats to honest fact-finding that such information in the hands of the defendant might impose upon the trial of the case. Even though in many states the names of the witnesses appearing before the grand jury are required to be on the copy of the indictment furnished the defendant, such statutes have been construed to be directory rather than mandatory.[35] If the names of the grand jury witnesses are omitted from the indictment in those states where a statute requires that such names be listed, a motion that a list be furnished the defendant is considered proper;[36] however after such a list is furnished the defendant, if a witness is offered at the trial whose name was not on the list furnished the defendant, the witness is nevertheless almost invariably allowed to testify, in view of the "directory" rather than "mandatory" constructions of the statutes.[37]

The federal statute requiring that the witnesses' names be placed on the indictment[38] has been construed as "mandatory", but it applies only to capital cases.[39] In some states it has been held[40] that the state is not required to furnish a list of prospective state witnesses to the defendant; however in others[41] the courts have required such a list of state's witnesses to be furnished the defendant unless the state shows to the satisfaction of the court that such information will, or likely will, be used improperly.

Recent developments in some states toward more complete criminal discovery have given the defendant a statutory right to subpoena and take sworn pre-trial depositions of all witnesses who might aid in the

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[34] Jones v. State, 222 Miss. 387, 76 So. 2d 201 (1954).

[35] *E.g.*, Kelly v. State, 239 Miss. 683, 124 So. 2d 840 (1960).

[36] *See* 6 WIGMORE, EVIDENCE, § 1851 at p. 400 (3rd ed. 1940).

[37] Kelly v. State, 239 Miss. 683, 124 So. 2d 840 (1960).

[38] 18 U.S.C. § 3432 (1964).

[39] McNabb v. U.S., 123 F.2d 848, 318 U.S. 332 (1941).

[40] *E.g.*, McDaniel v. State, 191 Miss. 854, 4 So. 2d 355 (1941); Boyd v. State, 253 Miss. 98, 175 So. 2d 132 (1965).

[41] *E.g.*, Thomas v. State, 161 Ark. 644, 257 S.W. 376 (1924); Mendolia v. State, 192 Tenn. 656, 241 S.W.2d 606 (1951); *contra,* State v. Isaacson, 8 S.D. 69, 65 N.W. 430 (1895).

preparation of the defense,[42] thus affording the defendant a similar means and power to pin down witnesses that the state has in its grand jury inquest.

Perhaps the most frequent motions made by the defense for access to the prosecution's information, are those motions which seek permission to examine written statements made by the state's witnesses to the investigators of the crime. The Jencks Act[43] governs this procedure by statute in the federal courts, and most states have historically followed the general procedure which the Jencks Act adopted with some minor variations. The defendant is generally denied access prior to trial of written statements of prosecution witnesses made to the investigating officers or prosecuting attorney;[44] however, at the trial stage, if the proper foundation is laid by the defendant showing contradiction between the witness' pre-trial statement and the in-court testimony, then the court may order the statement produced for delivery to the defendant for use in attacking the credibility of the witness on cross examination;[45] or if no such foundation is able to be laid, the defendant may move for the court to make an in camera inspection of any pre-trial written statements made by the witness, and if the court considers the statement contradictory to the in-court testimony, the court may turn over the written statement to the defendant for cross examination of the witness.[46] This procedure is different from the procedure established for the federal courts by statute[47] only in that in the state court the test to be met for examination by the defense is contradicion between the statement and the testimony; and in the federal court the test is only that the statement relate to the subject matter to which the witness testified. In at least one state the prosecution has been required by the court to furnish prior to trial, a written dying declaration made under the instructions of the district attorney.[48]

Because scientific evidence such as ballistic tests, fingerprints, autopsies, and blood tests play such an important role in criminal cases and often are essential to the state's case, the procedure of making this type of evidence available to the defense before trial probably would not discourage the state from conducting such tests. Because of their great probative value and expense if not impossibility of reproduction, there

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[42] Rules of Criminal Procedure, 1.200(f) (effective Jan. 1, 1968).

[43] 18 U.S.C.A. § 3500 (Supp. 1967).

[44] *E.g.*, Mattox v. State, 243 Miss. 402, 139 So. 2d 653 (1962); Brenner v. State, 217 Tenn. 427, 398 S.W.2d 252 (1965).

[45] *Id.*

[46] *Id.*

[47] 18 U.S.C.A. § 3500 (Supp. 1967).

[48] Springle v. State, 137 Miss. 731, 102 So. 844 (1925).

are good reasons for making such technical data freely discoverable. At any rate, the courts generally allow the defendant the opportunity of conducting his own tests on such physical objects[49] since these objects are evidence themselves, as opposed to written statements of witnesses, and such free discovery would save expense and time.

Conclusion

As the procedures allowing criminal discovery become more familiar to the bar and to the courts, the feeling may develop that if broader rights of discovery are made available to the defendants, then legislation should require defendants to reveal to some extent the nature of their defenses; and if the defense views heard in the courts that criminal discovery should approach the civil rules of discovery prevail, then the rules should be binding on both sides, and not just the government. In most states the defendant is not required to file an answer to the charges against him, and in only a few is he required to specially plead an alibi or insanity defense. In view of the historical lessons showing honest fact-finding often to be hampered by full disclosure of the state's case to the defendant,[50] further developments likely will require more than a pre-trial conference at which the defendant learns the state's case and goes home; rather there likely will be some exchange of information required if the field of criminal discovery broadens in the future.

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[49] *See e.g.*, Bellew v. State, 238 Miss. 734, 106 So. 2d 146 (1958).

[50] State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

UNION SECURITY AGREEMENTS IN THE PUBLIC SERVICE: AN EVALUATION

Daniel P. Sullivan *

I. Introduction

To deny a man a job with the government because he does not belong to a union is to deny him a job for reasons other than merit and this undermines the merit system, and reintroduces favoritism as a basis for employment.[1] Such a reintroduction is not desirable.[2]

Many different types of union security agreements exist in the private sector. They are the closed shop, the union shop, the modified union shop, the maintenance of membership, the agency shop, and the hiring arrangements. All of these are legal under certain circumstances.

Since it has been the practice to date to adopt almost in toto the private sector labor relations experience into the public sector labor relationship, it is not surprising that certain forms of union security agreements are presently being utilized legally in the public sector.[3] As a result, it is necessary to consider all the forms of union security agreements once again in regard to their application to the public sector to determine whether such application is reasonable.

II. The Forms

A closed shop is a shop that will only hire union card holders. In a recent survey of representative contracts, no closed shop provisions were found.[4] This is true since such provisions are illegal under federal labor law. Under the original Wagner Act[5] enacted in 1935, all forms of union security provisions were lawful. In 1942, the National War Labor Board instituted a war time policy changing the 1935 Wagner Act. Under this new rule, no employee could be required to become a union member, but those employees who were members when the contract took effect

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[1] W. R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 190 (1961).

[2] *See,* Mich. Stat. Ann. §§ 5.1191 (1) – 5.1191 (28) *as amended* (1968).

[3] *E.g.,* Re Oakland Cty. Sheriffs & Bd. of Supervs. & A.F.S.C.M.E., 3 Mich. Lab. Med. Bd. Rpts. 1 (1-8-68).

[4] B.N.A., *LRX,* Sec. 644.

[5] 49 Stat. 449 (1935), 29 U.S.C. §§ 151-168.

or who voluntarily became members during its term were obligated to remain members until the contract expired.[6] With the enactment of the Taft Act in 1947,[7] the closed shop was banned. This ban applies only to those who are controlled by this Act. Basically the rejection of the closed shop occurred because of the strong feeling that a man should not have to join an organization to acquire or keep a job.

A full union shop is a shop that requires all employees to join a union within a certain period, typically within thirty days of hiring. This is legal under the Taft Act as it was under the Wagner Act, but a member may only be fired at the request of the union if he does not pay his dues or initiation fee. There seems to be no difference in application of this form of union security and the closed shop. In both, a man is required to belong to a union to keep his job. Sixty-six percent of all those contracts included in a 1965 survey of representative contracts had a union shop provision.[8] It is the most common, yet in basic principle, it is the same as the closed shop. The only marked distinction between the two is that an individual must belong to a union before he gets a job under a closed shop arrangement, but need not join one until thirty days after getting his job under a union shop agreement.

Under the closed shop, the union power is significantly greater since it can refuse membership and preclude employment. Under the union shop, employment is already a fact when the union gains control of the employee. After thirty days though, they are both the same: an employee's employment is not continued because of merit alone. The hiring hall arrangements would seem to fall within this category also.

The modified union shop is the same as the union shop except that old employees may stay out of the union or new employees may utilize escape periods to withdraw from the union after having joined. The effects of this form could suffer under the same limitations as the former, depending on the restrictions imposed.

The maintenance of membership form requires persons who become union members to remain so, but does not impose any membership requirement on other employees. This form and the agency shop will be considered together because of their similarity. The agency shop obligates employees who do not join the union to pay the equivalent of dues for the union services. Under both of these forms, the individual's right

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[6] Re Federal Shipbldg. & Drydock Co., 10 L.R.R.Man. 1026 (National War Labor Bd., 1942).

[7] Pub. L. No. 80-101 (1947), *as amended* by Pub. L. No. 86-257 (1959); 29 U.S.C. § 168 *et seq.*

[8] *Supra*, note 4.

to stay out of a union is maintained. He need not join a union to maintain a job. His employment may be based on merit alone under these forms.

In the private sector, it is important for an individual to be hired on his own worth and not on that of the group. In the public sector, an added element is present, the need for continuity in government. Not only must an employee be qualified, he must be the best of those qualified. This is true in the private sector, only if the most qualified is not hired in the private sector, and a business discontinues, anarchy does not occur, as it does in the public sector.

Because of the relative newness of the public employee labor relationship, there are very few cases that have been decided specifically on the union security question.

III. Closed-Union-Agency Shops

The public employer has full power over the hiring and firing of his employees.[9] To allow a labor organization the right to perform this function through a closed shop may very well be an unlawful delegation of legislative power;[10] an unlawful delegation of discretionary power;[11] a violation of a civil service statute regulating all aspects of public employment;[12] a violation of the merit system alone;[13] or a violation of a right to work statute.[14]

The closed shop, before any other type of union security agreement, challenges the very essence of representative government. How can a representative be responsive to his constituents if he has no control over the selection of his employees, or the establishment of a standard which they must meet before being selected? A prospective employee must be a union member to be employed. To function then, government must then look to unions for employees in order to exist. A militant union could impede government under this form of union security.

The second form of union security utilized in the public sector is the union shop form. As noted above, its effect is the same as the closed shop after a period of days, but before these days have passed, the public employer has full control over who it hires and fires.

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[9] Frederick v. Owens, 35 Ohio C.C. 538, *error dismissed*, 95 Ohio St. 407, 116 N.E. 1085 (1916).

[10] Mugford v. Mayer, 185 Md. 266, 44 A.2d 745 (1945).

[11] Norwalk Teachers Assn. v. Bd. of Ed., 138 Conn. 269, 83 A.2d 482 (1951).

[12] Petrucci v. Hogan, 27 N.Y.S. 2nd 718, 5 Misc. 2nd 480 (1941).

[13] Los Angeles v. L.A. Bldg. Trades Council, 109 C.Ap.2d 81, 240 P.2d 16 (1949).

[14] Potts v. Hay, 229 Ark. 830, 318 S.W.2d 826 (1958).

This form of union security has received a varied reception. In *California v. Taylor*,[15] it was accepted as valid. In this case, a publicly owned transit system that had an agreement with a public employer which included a union shop clause was held to be subject to the Railway Labor Act for purposes of uniformity and to prevent labor disputes; and hence such provision was valid. This is an exceptional situation.

It has been rejected, though, on the grounds that it conflicted with a teachers' tenure act.[16] Under this act, a teacher acquires certain permanency of employment after teaching for a period of years. If a teacher does not gain tenure, he may be refused reemployment at the end of any school year. This act guarantees that a teacher who gains tenure will not only have the knowledge of how to teach, but will have proven his ability to teach. This apprenticeship is necessary to the profession. Under the union shop clause in this case, a teacher that did not join a union could, after teaching for a short period of time, only be hired from year to year. The court held that such a union security clause was invalid, and that to be valid, the legislature must specifically authorize such a clause. And the court added that it was not quite sure whether the legislature had this power either. The union shop violates professional standards in the teaching sector.

Recently, such a regulation has been held to be a reasonable requirement for the efficient and orderly administration of a police department.[17] The court based this position on the fact that no law in the state prohibits such a regulation, and that since a party need not join a union until a period of days have elapsed, the public employee has full control over who will be hired and who will be fired. In this case, a modified union shop was in effect. After being required to join a union, a policeman could then resign and the union could not force the public employer to dismiss him as long as he continued to pay dues.

Under this form of union security, the public employer exercises, as mentioned before, control over hiring and firing. While it is true that a militant union could impede government under this form, the public employer need not have the union's approval before hiring an employee, and may still dismiss him for reasons other than union activity.

The third and fourth form of union security used are the agency shop and the maintenance of membership forms.

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[15] 353 U.S. 553 (1957).

[16] Benson v. School Dist. No. 1 of Silver Bow Cty., 136 Mont. 77, 344 P.2d 117 (1959).

[17] Tremblay v. Berlin Police Union, 237 A.2d 668 (N.H. 1968).

The maintenance of membership form has been held to be an unlawful delegation of legislative authority.[18] Under this form, the employee need not join a union. His liability arises out of the voluntary act of joining a union or not quitting it within a specified period. This in effect is not a union security agreement. The union has no control, the employee has full liberty and the employer may hire other than union members.

This is also true of the agency shop form with the significant exception that under this form, the employees must pay dues to the union regardless of whether they join or not.

Approval of this form was given in *Re Oakland County Sheriffs & A.F.S.C.M.E.*[19] The Michigan Labor Mediation Board ruled in this case that if an employee would not pay dues under an agency shop arrangement, this discouraged union membership in violation of the Michigan Public Employee Relations Act.[20] This case was one solely of statutory construction. The Board found that the legislature intended that this form be utilized when it enacted the Act, the reasons for enactment being presumed valid.

IV. Right to Work Laws

As a result of the enactment of section 14(b) of the Taft Act,[21] several states have enacted right to work laws regulating the forms of union security agreements that will be permitted in their respective states in agreements between parties engaged in interstate commerce.[22] The right to work without being required to join a union is thought of as so fundamental that it was best left to the individual's determination as to whether he would join a union or not.

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[18] *Supra,* note 10.

[19] 3 Mich. Lab. Med. Bd. Rpts. 1 (1968). *See also,* Governor of Michigan's Committee on Public Employee Labor Relations Report dated 2-15-67 at p. 12 where this committee states that: "[T]he only permissible kind of union security provision would be one which conditions employment on payment or tender to the union of an amount equivalent to union dues." *But cf.* Carston C. Koeller, 60 L.R.R.M. 1246 (W.E.R.B. 1965), where in Wisconsin, it is unlawful discrimination to force a

[20] Mich. Stat. Ann. § 17.455(10) (1968).

[21] *Supra,* note 7.

[22] *E.g.,* Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

Such acts have been applied to the public sector. For example, in *Levasseur v. Wheeldon*,[23] the court held that a public employee could not be kept out of a union that admitted employees other than public employees because this violated the South Dakota Constitution's right to work law requiring that no person be denied employment because of membership or non-membership in a union.

Again in *Beverly v. City of Dallas*,[24] an ordinance prohibiting the formation of a union of public employees which had for its purpose the entering into of a collective bargaining agreement or the presentation of grievances which public employees had was held to be in violation of the right to work law of Texas. The right to work law only prohibited collective bargaining agreements, and not the presentation of grievances.

Yet such laws have been held not to apply to public employees. For example,[25] a public employee was fired for union activity in Tennessee, but when he brought an action for damages in a wrongful discharge action under the right to work law, the court held that the right to work law did not apply to public employees because they were not mentioned in the act, and decisions handed down prior to the enactment of the right to work law which excludes the sovereign from legislation are presumed to be valid since the right to work law did not include the sovereign.

There seems to be no valid reasons for not applying the right to work laws to the public sector. While such laws lessen the coercive power of the unions, which is clearly detrimental, they do affirm that each person has the ultimate power over whether he will join or not join a union, a higher standard.

V. A Persuasive Argument

Collective bargaining in the public service in the past few years has shown a marked increase.[26] Not only are there more unions and more public employees in unions,[27] but there are considerably more

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[23] 79 S.D. 442, 112 N.W.2d 894 (1962).

[24] 292 S.W.2d 172 (Tex. Ct. of Civ. App., 1956).

[25] Keeble v. Alcoa, 204 Tenn. 281, 319 S.W.2d 249 (1958).

[26] Sullivan, *How Can The Problem of the Public Employees' Strike Be Resolved?*, 19 Okla. L. Rev. 365 (1966); Sullivan, *Binding Arbitration In Public Employment Labor Disputes*, 36 Cinn. L. Rev. 666 (1967). In Australia though, this experience has a greater history. Sullivan, *Court Arbitration Of Public Employee Labor Relations Disputes*, 10 New Hamp. B. J. 84 (1968).

[27] Anderson, *Labor Relations In Public Service*, 1961 Wisc. L. Rev. 601 (1961), indicates that over one million public employees are union members.

statutory authorized collective bargaining agreements.[28] With these increases have come higher wages, shorter hours, and better terms and conditions of employment. Reasonable public employers are in part responsible for these advancements, but in addition to their efforts are those put forward by the union. For example, the transport workers union receives much of the credit for those increases in wages, hours and terms and conditions of employment gained in the aftermath of the New York Transit Strike of 1966.[29]

If all employees gain from efforts put forward by the union, it seems that all should bear the burden that the union carries in making these gains. This burden includes the salaries of the negotiators and their assistants, and the salaries of all of those that maintain the organizational structure of the union, plus the crucial cost, the possibility of the union losing all of its strength and disbanding in a test of strength with the public employer. Perhaps this service should not be looked upon as a gratuity by the non-union public employees that reap large benefits because of aggressive negotiations on the part of the union.

VI. An Initial Step: Dues Checkoff

Since collective bargaining in the public service is a relatively new relationship, and since the area of union security is still clearly a prenumbra area, it is not surprising that unions have sought a new approach to securing their position. The principal approach has been to cause the public employer to withhold union dues from an employee's wages, and then to transfer these withholdings to the union. Not only does this give to the unions a fixed income, but it also is a means of maintaining members.[30] This right may be created by statute on a mandatory or permissive basis, but apparently does require, at least, some legislative

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[28] For example, the following letter was received by this writer on November 7, 1967 from the Manager of the Personnel & Services Division of the Michigan Municipal League: "A survey by this office in January, 1965, indicated that there were organized public employees unions in 56 Michigan cities (with) over 4,000 population. The survey also indicated that there were nine signed union agreements in these cities.

"Public Act 379 of 1965 was given immediate effect on July 23, 1965, (Public Employee Labor Relations Act). A September, 1967, survey of Michigan municipalities indicated that forty-six cities have signed written agreements with one or more groups of municipal employees. The total number of signed labor agreements exceeds sixty."

[29] This is true since the legislature of New York specifically enacted legislation making it possible for the union to reap the benefits of its previously illegal concerted activity. N.Y. Pub. A., Ch. 6 (2-16-66).

[30] Hagerman v. Dayton, 147 Ohio St. 313, 71 N.E.2nd 246 (1947).

approval.[31] The principal objection to the checkoff is that wages should not generally be assigned.[32] For example, an ordinance providing for dues checkoffs has been held invalid where a statute was in effect making certain wage assignments valid, but not dues checkoffs.[33] The principal reason for such rights being presently enforced is that there does not seem to be any difference when the public employer withholds dues from when he withholds taxes and garnishments.[34] Apparently, there is not any valid reason for denying this form of union security. Here, no one is forced to join a union or remain in a union, yet at the same time, the union receives that which is absolutely necessary for its existance, financial support.[35]

VII. Strikes to Force Union Security Agreements

In the private sector of employment when a union attempts to make its efforts to cause discrimination effective by striking, the results may very well be serious for the union. It has been held that a strike to obtain an illegal form of union security agreement is unlawful from the start. The striker may be discharged at the employer's discretion.[36] Insistence by the union on such a contract is a refusal to bargain on the part of the union.[37] In addition, efforts on the part of a union to make an employer discriminate by an illegal union security contract could render the union liable to a complaint and charge of coercing and restraining employees, even though no effort is made to enforce the contract.[38]

Strikes by public employees are illegal.[39] To allow public employees to strike would be to allow chaos and anarchy to reign. Even though it is true that public employees do strike, the well settled rule, as a matter of practice, still exists. As a matter of law, while strikes by public employees have always been illegal, perhaps this may no longer

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[31] Matter of McLaughlin v. Niagra Falls Bd. of Ed., 38 Misc. 2nd 143, 237 N.Y.S.2d 761 (N.Y.S. Ct., 1963).

[32] *Id.*

[33] *Id.*

[34] Kirkpatrick v. Reid, 193 Misc. 702, 85 N.Y.S.2d 378 (N.Y.S. Ct., 1948).

[35] This is in accord with the Governor of Michigan's Committee on Public Employee Labor Relations Report dated 2-15-67 at p. 12.

[36] Re Mackay Radio & Tel. Co., Inc. 96 N.L.R.B. 740 (1951).

[37] American Newspaper Publishers Assn. v. N.L.R.B., 193 F.2d 782 (7th Cir. 1951), *aff'd*, 345 U.S. 100 (1953).

[38] Port Chester Elec. Constr. Corp., 97 N.L.R.B. 354 (1951).

[39] Statutes: Cal. Labor Code §§ 196-63 (West Supp. 1959); Conn. Gen.

be a clear prohibition. Recently, teachers in Holland, Michigan went on strike to force the Holland School District to raise their members' salaries. The School District sought to enjoin this strike pendente lite.[40] A temporary injunction was issued against the striking teachers. The Education Association obtained an emergency appeal to the Michigan Court of Appeals. This court held that the lower court decision was affirmed, and based its decision on the historic power of the court to enjoin strikes by public employees.[41] This decision was appealed to the Michigan Supreme Court.[42] In this court, the lower court was reversed. To attempt to compel legislatively that a court of equity in every instance of a public employee strike shall enjoin it would be to destroy the independence of the judicial branch of government was one reason the court gave for its decision. A second reason given by the court for its decision was that it is contrary to public policy in Michigan to issue an injunction in labor disputes absent a showing of violence, irreparable harm or a breach of the peace. The fact alone that the teachers were on strike apparently is not sufficient to include this conduct within the standard set by the court, at least for purposes of issuing an injunction pendente lite which, in labor relations, is the crucial form of injunction. For example, the main purpose of the Norris-LaGuardia Act[43] was to terminate the issuance of injunctions in private sector labor disputes at their offset because these injunctions were defeating organized union

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STAT. ANN. §§ 7-467-7-477, 10-1536-10-153f (1960); FLA. STAT. ANN. § 839.221 (1959); GA. CODE ANN. §§ 89-1301 to 89-1304 (1962); HAWAII REV. LAWS §§ 5-7 to 5-12 (Supp. 1964); ME. REV. STAT. ANN. 26 §§ 980-992 (Supp. 1965); MASS. ANN. LAWS, ch. 149, § 178(m) (1966); MICH. STAT. ANN. § 17.455(2) (1968); MINN. STAT. ANN. § 179.35 (1961); § 179.51 (Supp. 1965); NEB. REV. STAT. § 48-802 (Supp. 1961); OHIO REV. CODE ANN. § 4117 (Page 1965); PA. STAT. ANN. t.t. 43, §§ 215.0-215.5 (1964); R.I. GEN. LAWS ANN. §§ 28-9.4-16 (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 5154C (1948); VA. CODE ANN. §§ 40-65 to 40-67 (1950); WISC. STAT. ANN. § 66.94 (29) (Supp. 1965). *See also,* N.Y. Stat. Sen. Bill 4639 (1967). Int'l. Brh. of Elec. Workers v. Grand River Ram Author., 292 P.2d 1018 (Okla. 1956); Port of Seattle v. Int'l. Longshoremen's Union, 52 Wash. 2d 317, 324 P.2d 1099 (1958); Alcoa v. I.B.E.W., 203 Tenn. 12, 308 S.W. 2nd 476 (1957); New Jersey Turnpike Author. v. A.F.S.C.M.E., 83 N.J. Super. 389, 200 A. 2nd 134 (1964); Wichita Pub. Schools Empl. v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); Board of Ed. of Community Unit School Dist. v. Redding, 32 Ill. 2nd 567, 207 N.E. 2nd 427 (1965).

[40] School Dist. For City of Holland v. Holland Educ. Ass'n., 380 Mich. 314, 157 N.W.2d 206 (1968).

[41] School Dist. for City of Holland v. Holland Educ. Ass'n., 7 Mich. App. 569, 152 N.W.2d 572 (1967).

[42] *See* note 41 *supra.* Three justices wrote the majority opinion, two justices concurred in the results, and three justices dissented. Interestingly enough, the basis for the concurring opinion was that the striking teachers were not public employees at the time of the strike because they had not signed a contract.

[43] 47 Stat. 70 (1932), 29 U.S.C. §§ 1010-115.

pressure before it could materialize.

Since the strike itself is not unlawful as in the private sector, strikes to force the public employer to raise salaries, as was done here, is lawful.[44] If this form of pressure is valid, it might very well be used to force a public employer to grant a union security agreement, to bargain about such an agreement, or to enforce such an agreement after it has been reached even though illegal. There seems to be little difference between allowing strike pressure to force wages up, and a strike to force the public employer to cause his employees to join a union under a union security agreement. Of course, the principles of democracy must be maintained by selecting those representatives that will guide our government in an election, and the natural corollary of this is that the selected representative should have competent employees to aid him in this job which might not occur under a union security agreement. But none of this can be done without sufficient financial support. The former consideration though would still seem to be more crucial, and hence the extension of the strike power into this area may well be pernicious to democratic representative government.

VIII. Recognition and the Contract Bar

While it is apparent that union security provisions have not received acceptance to any great degree to date, there seems to be a clear trend towards supporting union security in a less direct way.

For example, when a public employer is required to recognize a union for purposes of collective bargaining, that union is the only one generally with which an employer can negotiate a collective bargaining agreement.[45] This is an enforceable right for a period of time.[46] It is thought to be stabilizing to the relationship to cause the employer to deal with just one union within an appropriate unit, and require this for the period during which the union is recognized. Sometimes recognition is not on an exclusive basis,[47] but nevertheless, it gives to a union

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[44] This also occurred during the New York Transit Strike when the transit workers struck and the New York State Legislature absolved them of the strike penalties in order for them to reap the benefits of their strike; N. Y. Pub. A., Ch. 6 (2-16-66). Note also that a right in public employees to strike is recommended by the Governor of Pennsylvania's Commission On Public Employee Labor Relations, 251 G.E.R.R. E-1 (7-1-68).

[45] 39 Am. Jur., *Labor*, Sec. 269 (1958).

[46] *Id.*

[47] For example, this apparently is the rule under the new Taylor law in New York. Re A.F.S.C.M.E., 223 G.E.R.R. E-1 (12-18-67), held that a minority union can get recognition. Therefore, a public employer's choice of another union as

any strength that a numerically large union can bring. After an agreement is reached, regardless of what union continues to represent the employees, in some cases, the contract survives an election by the employees in the union for another union.[48] The relationship is further established by this factor. In some cases, such recognition is a stabilizing factor when the public employees do not even belong to a union but have a union representing other employees negotiate a collective bargaining agreement for them.[49] The security the union gains from this, while not as meaningful as that acquired under a closed-union-agency shop agreement, has received fairly broad acceptance,[50] and certainly indicates that a form of union security is not offensive to basic legal concepts. The basic underlying factor is present: this form of union security is permissible as a form which allows unions to remain stable and grow without violating the law.

Another less direct way of allowing union security is through the contract bar rule.[51] This doctrine is not of statutory origin, but was established by the National Labor Relations Board.[52] The contract bar rule generally comes into effect when an agreement has been entered into between the parties and during the agreement another union challenges the present representative of the employees to an election to determine which union represents the employees. The union that presently represents the employees will claim that the contract in effect at the time of the challenge is a bar to an election. This rule has been adopted in the public sector.[53] Because of the fact that at the offset of an agreement, it may have to be approved by a legislative body, but a period of time may elapse between the time an agreement is negotiated and the time the legislative body approves it, the contract bar rule has

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representative is not sufficient to set aside this recognition because he must treat minorities neutrally.

[48] Re City of Virginia, 65 L.R.R.M. 1718 (Minn. State Lab. Council 1967).

[49] Teamsters Loc. 446 & City of Medford, 230 G.E.R.R. B-2 (W.E.R.B. 2-18-68).

[50] *E.g.*, GEN. STAT. OF CONN. §§ 7-467 to 7-477, 10-153b to 10-153f (1965); ME. REV. STAT. ANN. 26 §§ 980-992 (1965); MASS. ANN. LAWS 149, §§ 178g-178n (1965); MICH. STAT. ANN. §§ 17.455 (1)-(16) (1968); R. I. GEN. LAWS §§ 28-9.1-1 to 28-9.1-14 (1961); R. I. GEN. LAWS §§ 28-9.2-1 to 28-9.2-A (1965); WYO. STAT. ANN. §§ 27-265 to 27-273 (1965). *See also* State Labor Law, L.R. Rpt. § 17.125 (Del. 1965).

[51] Avco Mfg. Corp., 107 N.C.R.B. 295 (1953). Generally the doctrine is that if a contract is entered into by the representatives of the parties, the contract will preclude an election of a new representative within the period that the contract covers.

[52] *Id.*

[53] Re Highland Park and Municipal Office Employees And Loc. Union No. 41 and A.F.S.C.M.E., Mich. Lab. Med. Bd. Rpts. 173 (M.L.M.B. June 30, 1966).

been made to apply during this period also. For example, in *Re City of Grand Rapids Health Department*,[54] not only is the contract bar used in public employment to stabilize the employment relationship, but a contract entered into is valid for thirty days after having been entered into, but before the legislative body approves it.

After a union concludes a contract with the public employer, it may lose members, it may lose dues, and ultimately may lose certification. Therefore the contract bar rule may mean very little as a union security instrument when compared with a closed-union-agency type union security agreement. However, since so much effort is put forth to organize employees, and the union's efforts are completed with the achievement of their ultimate goal—a contract embodying improved employment guarantees—it seems logical that the contract bar is a highly useful union security device. It is one that, by analogy, could give strong support to the adoption of the other traditionally more useful forms. The basic underlying considerations appear to be the same.

IX. Conclusion

Little experience has been accumulated in the public sector of labor relations to determine whether, as a practical matter, union security as we know it in the private sector may be transplanted to the public sector.

There seems to be no question to the logic that if a man reaps the benefits from a union's success in collective bargaining, he should have to help pay for it in one way or another. Of the few forms of union security that have been mentioned, perhaps the agency shop agreement would be the most adaptable to the public sector labor relationship. It does not conflict with the right to work type statutes, and puts relatively little pressure on a governmental agency when that agency collects union dues and transfers them to the union because the governmental agency is already withholding sums from the employees' pay for taxes and in some cases garnishment.

By analogy, recognition of unions and the use of the contract bar rule have indicated that union security, as such, may be used in the public sector. Not only is a governmental agency required to recognize a union, but it must remain bound to a union agreement for a lengthy period. The basic social good involved is the stablization of the public employee labor relationship.

Unfortunately, the stability in this area may undergo a radical change if public employees are allowed to strike. There is some indica-

[54] 3 Mich. Lab. Med. Bd. Rpts. 194 (3-8-68).

tion that strikes may become lawful in certain instances as noted before. Such pressure might overcome the good derived from the merit system, and reinstitute a form of the spoils systems, only this time, through union machinery.

The closed and the union shops might well not be used in the public sector because the agency shop will fulfill the need of the employees to pay their way, and also because, they might also negate employment by merit.

Collective bargaining in the public service, while a reality for some time,[55] has only recently received legislative[56] and judicial[57] approval. While the greater rights to organize and join unions[58] and enter into collective bargaining agreements[59] are enjoyed by public employees on the state and local level, rights such as these are not enjoyed as fully on the federal level.[60] There is an indication, however, that this may soon change.[61] There seems to be no question though that collective bargaining at all levels of government is here to stay. Since the only experience that we have accumulated in collective bargaining is for a short thirty-odd years under the Wagner Act,[62] it is not surprising that this has been one of the major sources of law that has been used in labor relations determinations in the public sector.[63] However, these relationships are not identical, e.g., government must be continuous and orderly while a private sector employer need not be, the profit motive is not present in the public sector as it is in the private sector, and the need for a more qualified person is greater in the public sector than in the private sector because the entire common good must be maintained as opposed to a limited service performed in the private sector.

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[55] M. GODINE, THE LABOR PROBLEMS IN THE PUBLIC SERVICE (1951).

[56] *E.g.*, CONN. GEN. STAT. § 7-467 to 7-477 (1965); ILL. REV. STAT. ch. 24½, § 38b-3 (1963); ME. REV. STAT. ANN. ch. 26, § 981 (1965); MASS. ANN. LAWS ch. 149, § 178 F (1965); MASS. ANN. LAWS ch. 161A, § 19 (1964); MICH. STAT. ANN. § 17.455(9) (1965); R. I. GEN. LAWS § 28-9.I-4; R.I. GEN. LAWS § 28-9.2-4 (1963). *See also*, Wyo. Pub. A. ch. 197, Sec. 1-9, L. (1965). State Labor Law, L.R.R.Rpt. § 17.125 (Del. 1965).

[57] *E.g.*, School Comm. of Pawtucket v. Pawtucket Teachers' Alliance, 221 A.2d 806 (R.I., 1966).

[58] *E.g.*, CONN. GEN. STAT. §§ 7-467 to 7-477; 10.153b to 10.153f (1956); FLA. STAT. ANN. § 839.221 (1959); ME. REV. STAT. ANN. ch. 26 §§ 980-992 (1965); MASS. ANN. LAWS ch. 149 § 178D (1962); MICH. STAT. ANN. § 17.455(9); MINN. STAT. § 179.52 (1965); MO. STAT. ANN. § 295.010 (1965); ORE. REV. STAT. §§ 243.710 to 247.760 (1963); R.I. GEN. LAWS ANN. §§ 36-11-1 to 36-11-5 (1958); R.I. GEN. LAWS ANN. §§ 28-9.2-1 to 28-9.2-14 (1963); TEX. REV. CIV. STAT. ANN. art. 5154c (1947); WISC. STAT. ANN., § 111.70 (1965); WYO. STAT. ANN. §§ 27-265 to 27-273 (1965). *See also*, State Labor Law, L.R.R.Rpt., § 17.125 (Del. 1965).

[59] *E.g.*, ALASKA, STAT. §§ 23.40.010 to 23.40.040 (1959); CONN. GEN. STAT. REV. §§ 7-467 to 7-477, 10-153b to 10-153f (1965); ILL. REV. STAT. ch. 111 2/3 § 301

No conflict arises in borrowing from the private sector when such matters as determining how best to chose an appropriate unit arises, but a question clearly arises when union shop provisions are the subject of discussion. As a result, perhaps the steps involved in collective bargaining in the public sector should be taken with care when the lack of a consideration of merit as a primary requisite for employment might well be disabling or even pernicious.

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et seq. (1945); LA. REV. STAT. ANN. § 23-890 (1964); ME. REV. STAT. ANN. ch. 26 § 981 (1965); MD. ANN. CODE art. 64A, § 14 (1961); MASS. ANN. LAWS ch. 149 § 178F (1965); MASS. ANN. LAWS ch. 161A § 19 (1964); MICH. STAT. ANN. § 17.455(9) (1965); MINN. STAT. § 179.52 (1965); MO. REV. STAT. § 295.010 (1965); N.H. REV. STAT. ANN. § 31.3 (1955); OKLA. STAT. ANN. § 82-862(m) (1951); ORE. REV. STAT. §§ 243.710 to 243.760 (1963); R.I. GEN. LAWS § 28-9.1-4 (1961); R.I. GEN. LAWS § 28-9.2-4 (1963); WASH. REV. CODE §§ 54.04.170, 54.04. 180 (1963); WISC. STAT. ANN. § 66.94 (29) (1965). WISC. STAT. ANN. § 111.70 (b) (1965). *See also,* State Labor Law, L.R.R.Rpt. § 17.125 (Del. 1965); Del. Pub. A. Ch. 8 §§ 801 *et seq;* Pa. Pub. A. § 24 (1963); Pa. Pub. A. 1414 (1959); *and* Wyo. Pub. A. ch. 197 §§ 1-9 (1965).

[60] *E.g.,* Executive Order 10877 of the President of the United States, 27 Fed. Regis. 551 (1962).

[61] A report will soon be released by the President of the United States on proposed changes in Executive Order 10988, 27 Fed. Regis. 551 (1962).

[62] *Supra,* note 5.

[63] *E.g.,* Re Oakland Cty. Sheriffs & Bd. of Supervs. & A.F.S.C.M.E., 3 Mich. Lab. Med. Bd. Rpts. 1 (1-8-68), where the Michigan Labor Meditation Board rejected the private sector-public sector differences in union security as a subject of collective bargaining.

THE SOCIAL SECURITY ADMINISTRATION VERSUS THE LAWYERS . . . AND POOR PEOPLE TOO

*Robert M. Viles**

PART II

III. THE PROCESS OF DETERMINING CLAIMS FOR SOCIAL SECURITY BENEFITS

A. The Stages of Decision-Making

What must Ed Sizemore,[101] the everyman claimant for social security benefits, do in order to establish his entitlement? The disputes over his age and the miseries in his back suggest that he has the alternative possibilities of qualifying for old age benefits or disability benefits.[102] From action on his initial application to the Social Security Administration through ultimate federal appellate court review, he has six opportunities to obtain a favorable decision on his claim. In describing the entire process the six steps reduce to three stages, each of which consists of a decision and review of the decision: first, administrative determination of the initial application and reconsideration of the determination; second, hearing before an administrative Hearing Examiner and review of his decision by the Administration's Appeals Council; and third, action for review by a federal District Court and appeal from its decision to a Court of Appeals.[103]

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[101] J. FETTERMAN, STINKING CREEK, 34, 37 (1967); *see* text of Part I which corresponds to note 1.

[102] A wage-earner can qualify for reduced benefits at age 62 or full benefits at age 65 if he is fully insured. Social Security Act §§ 202(a), (q). He can qualify for disability benefits if he is under 65, disability insured, and under a disability. Section 223(a). All references in this article to Social Security Act provisions currently in force are cited to the Act only, as amended through 1965, *e.g.*, Social Security Act §§ 201-27, 1801-75, unless they are affected by the Social Security Amendments of 1967, enacted into law on Jan. 2, 1968, cited to 81 Stat. 821 (13 U.S.C. CONG. & AD. NEWS, Jan. 20, 1968).

[103] The Supreme Court of the United States is omitted from consideration because it seldom reviews a social security benefits decision. The most recent case

1. *Initial Application and Reconsideration*

The claimant initiates the application process when he or his representative[104] files written evidence[105] of an intention to claim benefits,[106] using either an appropriate official form or some substitute statement.[107] An informal inquiry about benefits or an oral indication of application is not sufficient,[108] and the Social Security Administration cannot be estopped from denying the effectiveness of such an attempt.[109] Each application must be accompanied by the required supporting evidence of entitlement.[110] Submitting false information subjects the applicant to fine or imprisonment[111] and recovery by the Administration of any benefits so gained.[112] The completed application may be filed at any of the Administration's more than 700 District Offices or 3,300 "contact stations."[113] The date of application, which is either the day it is

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which the Court has decided on the merits is Flemming v. Nestor, 363 U.S. 603 (1960). It has, however, granted certiorari, in Hopkins v. Gardner, 374 F.2d 726 (7th Cir. 1967), an attorney's fee proceeding.

[*Ed. note:* The Supreme Court, in a 5-3 decision *sub. nom.* Hopkins v. Cohen, 390 U.S. 530 (1968) reversed the Seventh Circuit. *See especially* text corresponding to notes 299 through 310 *infra.*]

[104] 20 C.F.R. § 404.603 (1967).

[105] 20 C.F.R. § 404.610 (1967).

[106] The rules described in this section, promulgated by the Secretary of the Department of Health, Education, and Welfare under authority of Social Security Act § 205(a), apply to claims for all social security cash benefits except claims for payments under medicine insurance. For the rules for medical insurance determinations and hearings, *see* Proposed Rule Making, 20 C.F.R. Part 405, Subpart H, *Review and Fair Hearing under the Supplemental Medical Insurance Program; see* 32 Fed. Reg. 18,028 (1967).

[107] 20 C.F.R. § 404.602 (1967). Any written statement indicating an intention to claim benefits is adequate if the appropriate application form is executed and submitted within six months. 20 C.F.R. § 404.619 (1967). *Cf.* Husk v. Gardner, 1A Unemp. Ins. Rep. ¶ 14,607 (N.D. W.Va. 1966) (letter to President of United States "in regard to my social security disability benefits" considered as an initial application).

[108] *See, e.g.*, Smaltz v. Ribicoff, S.S.R. 63-37c, 1963 Cum. Bull. 13 (W.D. Mo. 1962).

[109] *See infra,* text corresponding to note 152.

[110] *See* 20 C.F.R. §§ 404.701-404.728 (1967); Social Security Ad., Handbook ch. 17, *"Evidence Required to Establish Right to Benefits"* (3d ed. 1966) [hereinafter cited as Handbook]. Earnings records, however, on which insurance coverage and amount of benefits are computed, are maintained by the Administration. Social Security Act § 205(c).

[111] Social Security Act § 208(b).

[112] *See* Social Security Act § 204(a), 20 C.F.R. § 404.957 (1967), S.S.R. 64-2, 1964 Cum. Bull. 91.

[113] 20 C.F.R. § 422.5, 32 Fed. Reg. 13,654 (1967). All references in this article to the government agency which conducts the social security program are to

received by an Administration office or employee or, if it is mailed, the date of postmark,[114] is very important because it determines when benefits may begin and, if the application is premature, whether it is effective at all.[115]

In order to submit an application the claimant usually appears at a Social Security District Office or contact station, where he receives the assistance of a Claims Representative in making and substantiating his claim. A Claims Representative must be a college graduate or have gained his position by rising through the ranks of Administration employment.[116] He receives initially several weeks' classroom instruction plus a longer term of supervised in-service learning as a trainee Representative.

The Administration's organization of claims intake seems to be so structured that the Claims Representative is continually exhorted to maximize the number of applications obtained.[117] In this way, as well as by the generally helpful and mollifying attitudes and practices encouraged by the Administration,[118] the Claims Representative is placed

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the "Administration," although the "Secretary" of the Department of Health, Education and Welfare is the nominal repository of all authority under such legislation as the Social Security Act, and thus is the captioned defendant in all suits against the Administration to enforce claims, the promulgator of its regulations, and so on.

[114] 20 C.F.R. § 404.608 (1967).

[115] An application for any monthly benefits filed prior to the month in which eligibility begins is fatally premature if the applicant fails to qualify before final administrative or court decision on his claim, Social Security Act §§ 202(j)(2), 223(b); an application filed more than one year after entitlement begins can recover back benefits for only twelve months prior to its date, §§ 202(j)(1), (3), 223(b), (c)(2)(B). An application for lump sum death benefits must be filed within two years of the death of the deceased insured person unless "good cause" for allowance of extra time is shown, §§ 203(i), (p). An application for monthly benefits may be withdrawn, 20 C.F.R. § 404.615 (1967), a right especially significant to a claimant who has unnecessarily or shortsightedly taken a reduction in retirement benefits under an application filed during the optional early retirement age period. *See infra* note 264.

[116] A qualifying examination must also be successfully completed, but this requirement is occasionally waived in the case of some candidates who are college graduates.

[117] It is not clearly known to what extent pressure is exerted upon Claims Representatives to obtain applications and other requests for Administration action. Although the Administration makes projections of future claims experience, *see* note 90 in Part I of this article, there is no evidence that it converts them into regional or district quotas for achieving claims. Each district office does, however, engage in a wide range of promotional activities, including handout literature, press and other media releases, and talks before civic and business groups, to encourage persons to seek benefits to which they may be entitled.

[118] *See, e.g.*, E. DE SCHWEINITZ & K. DE SCHWEINITZ, INTERVIEWING IN SOCIAL SECURITY (SOCIAL SECURITY AD. 1961).

in a position to serve the needs of any potential claimant who appears before him. In most instances there is no conflict between the Representative's first allegiance to his employer and his duty to assist claimants, and applications are processed smoothly without undue complaint or dissatisfaction. The Claims Representative who has dealt with the claimant makes a "recommended" decision on the application according to the procedures and rules of his claims manual.[119] The District Office forwards the decision and the supporting evidence to a regional payment center, which routinely adopts the Representative's determination upon review of it and, if the claimant has established entitlement, authorizes the Treasury Department to make benefit payments.[120] The different process for disability cases is discussed later.

In a minority of cases, however, the Claims Representative is unable adequately to represent both the Administration and the claimant. The conflicts arise usually for one of two reasons: either the claimant because of some incapacity or unawareness does not understand what is happening, or he is unable by himself or with the routine assistance of a Claims Representative fully to pursue his rights. The case of Ed Sizemore is typical of these difficulties. It is unlikely that he either fully comprehends the nature of the age and disability disputes in which he is involved or is able effectively to make the best case for himself. It is equally unlikely that the representation which he needs is within the expected conduct of the Claims Representative with whom he deals.

The dispute over Sizemore's age illustrates one kind of problem. As a claimant he "must establish by satisfactory evidence the material allegations of his application."[121] including the allegation that he meets the age requirement for old age benefits.[122] The Administration determines by regulation and rule the kinds of evidence that are satisfactory for proving any allegation, the order of acceptability and conclusiveness among the kinds, and the criteria by which the order is established.[123] Although the prescriptions for birth date evidence are typical in their exhaustive detail, the overriding principle of acceptability simply states

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[119] Pursuant to the Freedom of Information Amendment to the Administrative Procedure Act, effective July 4, 1967, 5 U.S.C.A. § 552 (1967), the Administration now makes available in each District Office a copy of the claims manual for perusal by any interested person.

[120] *See* Social Security Act § 205(i).

[121] 20 C.F.R. § 422.7(b) (1967). "The applicant's failure to submit evidence as requested by the Administration shall be a basis for determining that the conditions of eligibility concerning which such evidence was requested have not been met." 20 C.F.R. § 404.701(b) (1967).

[122] 20 C.F.R. § 404.703 (1967).

[123] *See* note 110 *supra.*

that "[g]enerally, the highest probative value will be accorded to a public record of birth or a church record of birth or baptism established or recorded before age 5."[124] If the claimant himself cannot produce such a highly probative record, the Claims Representative may request, either as a matter of course or discretionally, that the claimant authorize the Administration to obtain the earliest census records that list him and thus may be the best evidence of his age. If these records indicate that the claimant was born on a certain date, but the claimant produces evidence that he was born earlier, e.g., school records, marriage records, testimony of relatives and other information that tends to show consistent adherence to one date of birth, the conflict may be resolved in the Administration's favor, either according to the principle quoted above or under a more general maxim that the oldest public evidence shall prevail.[125]

Census records are not infallible oracles of the truth, especially when they relate evidence gathered generations ago from people to whom age is an approximate quantity and about individuals remotely settled among families of the same common name.[126] Although a Claims Representative may be personally convinced that the claimant's own proof of his age is more convincing than the revelations of census documents and may even recommend that the claimant prevail, it is not his position either to write a brief for the claimant urging the Administration to ignore its order of probative value or to make a final and binding decision.

The Administration may not always or even routinely decide a question of disputed age against the claimant, but the possibility arises that it will do so, and several reported proceedings indicate that the matter is not inconsequential.[127] In this way the relationship between the claimant and the Administration may become adversary, and the former, by his agreement to permit use of census records, has in effect been compelled to give evidence against himself.[128] The Administration

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[124] 20 C.F.R. § 404.703(c) (1967).

[125] The determination of age may be especially crucial with respect to medicare entitlement. Perusal of the Administration's claims manual indicated that the evidentiary standards for age determination now call for a decision based on the "best evidence." As of the date of preparation of this article, however, 20 C.F.R. § 404.703 (1967) has not been amended.

[126] *See e.g.*, J. FETTERMAN, STINKING CREEK 59-94 (1967).

[127] Merrell v. Gardner, 1A UNEMP. INS. REP. ¶ 14,900 (M.D. Ga. Oct. 13, 1967), S.S.R. 67-38a (Jul. 1967), *reversed and remanded*, 397 F.2d 65 (5th Cir. 1968), Maghikian v. Cohen, 1A UNEMP. INS. REP. ¶ 15,169 (N.D. Calif. Sept. 9, 1968), Jennings v. Gardner, 1A UNEMP. INS. REP. ¶ 15,109 (D. D.C. June 24, 1968), Mitchell v. Secretary, 1A UNEMP. INS. REP. ¶ 14,903 (E.D. Tex. Nov. 2, 1967).

[128] "In no case shall information furnished under the authority of this section

has assumed the roles of law-maker, investigator, judge, and jury.

The question of miseries in Ed Sizemore's back illustrates a second kind of problem for the claimant at the initial application stage. In taking the application for disability benefits the Claims Representative secures the applicant's description of his impairments and their effect on his ability to work, information about his employment history, age, and education, and reports from his attending physicians and from hospitals and other medical institutions in which he has been confined in connection with his impairment.[129] The determination of the claimant's disability insured status for entitlement to benefits is then made as a separate decision-making process in substantially the ways described above. If he has coverage extending through the date of a possible disability "onset,"[130] the claim is transferred from the District Office to the state agency which by agreement with the Secretary of Health, Education and Welfare is responsible for determining whether the claimant is

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[authorizing the Secretary of Commerce to furnish copies of census records] be used to the detriment of the persons to whom such information relates." 8 U.S.C. § 13(c) (1966). The Appeals Council has held that this section is inapplicable to the Administration's use of census records, that its protection may be waived, and that the claimant did validly waive his statutory right. S.S.R. 67-38 (Jul. 1967).

[129] The Administration may also undertake field investigations of the claimants' allegedly disabling conditions.

[130] There exists among disability claimants what might be called the "running out" syndrome. In order to qualify for benefits a claimant must essentially have, as of the month in which he becomes disabled, five years (20 quarters) of coverage in the previous ten years (40 quarters), Social Security Act § 223(c)(1)(B)(i), unless he is under 31 years of age, § 223(c)(1)(B)(ii), *as amended,* 81 Stat. 821, § 105(b) (13 U.S.C. CONG. & AD. NEWS 4587, Jan. 20, 1968). Therefore, if for any reason he stops working, his coverage eventually expires. He may not apply for benefits until some years thereafter, *e.g.*, when he has become so disabled that he thinks he can qualify for benefits or when he first learns that he may be entitled to them. At that time it may be difficult to determine whether he was disabled, when, much earlier, his coverage expired, or it may be determined that although he is presently disabled within the definition in the Social Security Act, he was not disabled then. *See, e.g.*, DeNafo v. Gardner, 272 F. Supp. 44 (D. N.J. 1967).

On the other hand, a person after he quits work may apply for benefits, suffer a denial of his claim, but, instead of appealing the first determination against him, persist in applying anew for benefits. Three or more applications are not uncommon. Unless there has been a change in his condition, or he is able to obtain a time extension for prosecuting, or reopening of, the prior adverse adjudication(s), *see* text corresponding to notes 257-278 *infra,* the doctrine of res adjudicata, *see* text corresponding to notes 252-253 *infra,* is applicable to foreclose a fresh determination of his continuing claim. *See, e.g.*, Rivers v. Celebreeze, 217 F. Supp. 141 (W.D. Va. 1963). However, if in the interim between claims the entitlement for disability has been expanded, as under the 1965 Social Security Act amendments, *see* note 57 of Part I, he may be eligible for a new determination to the extent of the expansion. *See, e.g.*, Farley v. Gardner, 276 F. Supp. 270 (S.D. W.Va. 1967).

under a disability and, if so, the time during which it has existed.[131]

In most states the agency determining disability is the principal vocational rehabilitation unit, approved under the federal Vocational Rehabilitation Act,[132] to whom it is the Congressional policy to refer all disability claimants for "necessary vocational rehabilitation services, to the end that the maximum number of such individuals may be rehabilitated into productive activity."[133] Thus the referral is supposed to perform the dual purpose of ascertaining disability and overcoming it.[134]

If on the second or subsequent application it is determined that at some time since the prior determination(s) the claimant has become disabled according to the Act, the question may then arise whether he became disabled while he had disability insurance coverage. The prior determination is res adjudicata for so long as the facts of his condition have not changed: did they change before or after his coverage expires? If the latter, res adjudicata applies to prevent inquiry into whether the first claim may have been decided erroneously, and expiration of coverage prevents granting benefits on the basis of his present condition. If the former, he may be entitled to benefits. Therefore the decision-maker must rule on the especially difficult question of when, in the past, his condition changed from what it was at the time of the prior adjudication to what is at the present. *See, e.g.*, Moore v. Celebrezze, 252 F. Supp. 593 (E.D. Pa.), *aff'd per curiam*, 376 F.2d 850 (3d Cir. 1966).

[131] Social Security Act § 221(a).

[132] Social Security Act § 221(b).

[133] Social Security Act § 222(a).

[134] There is no assurance that a person will *either* be rehabilitated in work capacity *or* obtain disability benefits. *See, e.g.*, Cooke v. Celebrezze, 365 F.2d 425, 427-28 (4th Cir. 1966). The process of administrative hearing in review of denials of disability claims does not focus on the claimant's rehabilitation. *See* text corresponding to notes 196-198 *infra*. The cost of rehabilitating persons *entitled* to disability benefits can be paid from social security trust funds "to the end that savings will result" and to the extent of one percent of the total benefits paid to disability beneficiaries in a fiscal year. Social Security Act § 222(d), *as amended*, 81 Stat. 821, § 104(b)(4) (13 U.S.C. CONG. & AD. NEWS 4587, Jan. 20, 1968). See also HANDBOOK § 542 at 106. Apportioned according to state, the maximum amount for Kentucky in fiscal year 1965 would have been $284,000 for disabled workers. *See* SOCIAL SECURITY AD., BULL., ANNUAL STATISTICAL SUPP., 1965, Table 97, at 92, [hereinafter cited as 1965 Statistical Supp.]. In that year the total funds available to the Kentucky rehabilitation program were $2,461,057. Nine thousand five hundred and seventy-four persons were served; 4,144 persons, rehabilitated. In the same year 23,397 Kentuckians received disability benefits. *Id.* at 93, Table 98. "The primary purpose of the Bureau of Rehabilitation Services is to provide services that are necessary to supplement an individual's own resources so he will be fit to engage in gainful employment. It recognizes the *privilege* to such services of an individual who has a physical or mental disability which constitutes substantial handicap to employment, and appears to have employment potential. *To the extent that resources are available,* counseling, physical restoration, training . . . and other goods and services will be furnished to each individual deemed eligible. . . ." Kentucky State Plan for Vocational Rehabilitation § 6.1 (a), (b) [1966] (emphasis supplied). "In the interest of efficiency and economy, SSA disability State agencies conduct a

Upon receiving the case the state rehabilitation or equivalent agency orders an examination of the claimant by one or more of the physicians with whom it contracts for such services, unless the medical evidence of the claimant itself establishes that his impairments are disabling.[135] The claimant can be denied benefits for refusing or failing to submit to agency-ordered examinations because, apparently, the evidence gained thereby is a necessary part of "such medical . . . evidence . . . as the Secretary may require."[137] Upon analysis of all evidence in the case the agency renders a determination of the claimant's disability under the Social Security Act, which it forwards to the central payment center for disability claims in Baltimore. The Administration, after review, may overturn or modify an agency decision that disability exists.[138]

This distribution of functions permits an adversary situation to rise different in kind from ones involving only the claimant and the Administration, such as the age dispute described above. In the first place an adversary situation may arise because of the contextual circumstances in which the process takes place. On the one hand, the state agency's examining physicians are encouraged or permitted to issue fully detailed reports of the medical condition of the examinee, whom, however, they may only observe and test once. This constitutes a substantial limitation on obtaining an accurate evaluation, especially for certain injuries and diseases.[139] Notwithstanding their competence and experience for assess-

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'gross screening' of disability applicants to identify those who have some potential for vocational rehabilitation. The cases of claimants with vocational rehabilitation potential are reviewed by the State rehabilitation counselor who determines their eligibility for rehabilitation services." DISABILITY INSURANCE STATE MANUAL § 023A4–025 (Jul. 4, 1967).

Disability benefits shall be reduced in any month in which the recipient "refuses without good cause to accept rehabilitation services available to him under a State plan approved under the Vocational Rehabilitation Act." The reduction applies also to the benefits of the disabled person's dependents. Section 222(b). During a period of trial work, however, benefits are not reduced. Section 222(c). *But cf.*, Skeens v. Gardner, 377 F.2d 405 (4th Cir. 1967).

[135] "Such further field investigations and medical examinations as may be necessary are carried forward at the initiative of the State agency evaluation team, composed of a physician and a vocational specialist, and that team is responsible for making the disability determinations." HANDBOOK § 135 at 14.

[136] 20 C.F.R. § 404.1530 (1967). "Religious or personal scruples against medical examinations shall not excuse an individual from submitting evidence of disability." *Id.*

[137] Social Security Act § 223(d)(5), *as amended*, 81 Stat. 821 § 158(b) (13 U.S.C. CONG. & AD. NEWS 4631, Jan. 20, 1968).

[138] Social Security Act § 221(c). The Administration may not, however, reverse an agency determination that disability does not exist. *Id.*

[139] *See, e.g.*, Seldomridge v. Celebrezze, 238 F. Supp. 610 (E.D. Pa. 1964).

ing the medical bases of disability and the independence of their professional status, it can be presumed that the same kind of relationship may occasionally exist between themselves and the contracting agency that is found in other, similar human relationships, i.e., some disposition to respond to the preferences of the employer.[140] On the other hand, the claimant's personal physicians may or may not provide a comprehensive report of their evaluation of the claimant's impairments. There is no provision for public compensation for their time and skill in making the report. If they have ministered to the claimant over long periods of time, perhaps throughout the history of his allegedly disabling impairments, they should be in better positions to make more accurate and realistic appraisals than a physician who has examined the claimant only once.[141] However, the personal physician, unlike the state agency's contract physician, may not be a specialist in the claimant's ailments and, moreover, may be biased, either because of his personal judgments about disabling conditions or because of friendship with and sympathy for the claimant. It is unfortunate that the absence of compensation for a full medical report encourages him to offer merely conclusionary statements that the claimant is not or, more frequently, is "totally" or "100 percent" disabled or "cannot do any work."[142] Such reports are clearly valueless in making determinations of disability on the basis of substantial evidence of physical and mental impairments[143] and have increased the notoriety of "claimants' doctors."[144]

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[140] Whether the result is ever a bias against finding disabling impairments in cases of difficult medical evaluation and whether the state agency in determining with which physicians to contract over exerts a preference for medical men known to be conservative in their impairment evaluations for professional or personal reasons is, like the alleged biases of claimants' physicians, *see* note 144 *infra*, a matter of common speculation.

[141] *See, e.g.*, Blevins v. Fleming, 180 F. Supp. 287 (W.D. Ark. 1960).

[142] In the past the forms furnished by the Administration to physicians for making their reports have not encouraged narrative statement. The current form, SSA-826 (Jul. 1967), does provide ample blocks of blank space.

[143] *But cf., e.g.*, Ross v. Dunn, 356 F.2d 664 (5th Cir. 1966). "In disregarding the uncontradicted opinion evidence of the medical experts who had examined appellant, and in undertaking a scientific research of his own and deciding the case on what he thought this medical text meant, the Hearing Examiner set himself up as an interpreter of recondite medical knowledge and decided the case without regard to the evidence of the medical witnesses who had examined appellant. . . . It was error on the part of the Hearing Examiner to hold in this case that the physician's opinions or conclusions must be supported by adequate objective clinical findings. Where uncontradicted medical evidence tended to establish disability of claimant and decision of the Secretary denying benefits was not supported by substantial evidence."

[144] *See, e.g.*, H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 281-82, 290-91 (1962).

The assistance which the Claims Representative can render to the claimant in showing that he is disabled is minimal. While he can and does obtain the resumé, blank-filling facts of the applicant's "age, education, and work experience" for submission to the state agency and may expedite receipt of the claimant's physicians' reports, his development of the case for the claimant is clearly not comparable to that of an attorney or other independent representative. As a government minion he is not in a position, for example, to insist that a physician take the time to submit a descriptively detailed report. Unless he has become exceptionally skilled in the medical lore of disabling impairments, he is not able to advise the claimant whether even detailed reports adequately evidence all of the claimant's possible impairments in ways most supportive of a favorable disability determination.[145] Moreover, because he himself does not make even a "recommended" determination of disability for payment center approval, but instead transfers the case to an agency with which he is not connected, he is not in any position to construct and act upon an integrated analysis of the claimant's medical conditions and his age, education, and work experience that fully develops his present employment competence. Nevertheless, there seems to be no provision for anyone in the agency personally and directly to take up the claimant's representation when it leaves the Claims Representative's hands. If the applicant's claim is denied, he must receive written notice of the denial which states (a) the grounds for denial, and (b) his right to apply for reconsideration[146] of the initial determination[147] within six months from the date he receives the notice.[148] A typical letter containing the notice is cast in the sympathetic but firm style and jargon of a friendly, rather legalistic bureaucracy. It is strong in general reasons for the decision against the claimant, but weak or totally lacking in specific advice for improving his case upon reconsideration. The over-

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[145] There appears to be some division of labor among Claims Representatives so that specialization in disability cases does occur.

[146] 20 C.F.R. § 404.907 (1967).

[147] "Initial determinations" include not only decisions on applications for any monthly or lump sum benefit and for entitlement to hospital and medical benefits, *see* note 106 *supra,* but also initial decisions of the Administration on modification of benefit amounts, establishment of a "disability freeze," termination of benefit entitlement or disability freeze, reinstatement of benefits, revision of earnings record, and other similar issues. 20 C.F.R. § 404.905 (1967). Only denials that are initial determinations are subject to reconsideration, hearing and the other stages of the review process. *See, e.g.,* 20 C.F.R. §§ 404.910, 404.917 (1967). Certain decisions of the Administration are expressly not initial determinations, *e.g.,* allowances of attorneys' fees, but they may be subject to unspecified administrative review. 20 C.F.R. § 404.906 (1967), *as revised,* 32 Fed. Reg. 7750 (1967), *as revised* 33 Fed. Reg. 3060 (1968).

[148] 20 C.F.R. § 404.911 (1967).

all impression conveyed is one of calm assurance that the denial is based on expert and impartial analysis of all facts concerning the claim. It is not surprising that about seventy percent of all denials of initial applications for disability claims are not appealed for reconsideration within the six months allowed (or thereafter if there is good cause for lateness)[149] and thus become decisions final and binding on the parties.[150]

To an unlettered person such as an Appalachian mountaineer the letter denying his claim may be bewildering, and the reasons which he may conjure up for the action against him may seem fantastic: the people in the social security office are no good, they don't believe him, someone is against him and trying to cheat him, and so on.[151] He may realize that he could or should do something further, but his solution may be to let the six months run and then to reapply for benefits at a different, and hopefully friendlier, social security office.

It is not possible for a Claims Representative to assist a claimant who does not minimally cooperate with the bureaucratic system by reappearing at a social security office or contact station within the six months. Even then the assistance is limited to encouraging and helping the claimant to gain additional evidence including, in disability cases, more medical examinations, that builds a bigger file. There is no provision requiring the Claims Representative to check on a claimant who does not reappear, no matter how incapacitated or confused he may be. In fact, unless an exception is made to the usual routine, a particular claimant-representative relationship is entirely fortuitious; that is, it depends on which representative in the office is available when the claimant walks in the door or comes to the head of the waiting line.

The absence of a true client-representative relationship is demonstrated by the courts' refusal to aid the claimant who seeks to estop the Administration from denying statements of its employees upon which he has relied. The grounds for the refusal are familiar:

> Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated

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[149] The number of reconsiderations sought in fiscal 1967 was 28.8 percent of claims initially denied. Allowing for the time lag between initial determination and reconsideration and for the increase in total denials in 1967 over 1966, it is doubtful that more than 30% of denials are followed by requests for reconsideration.

All statistical presentations of social security administrative and court claims proceedings made in this article are quoted from, or based upon, materials supplied to the author by the Social Security Administration except as otherwise noted. Letter and enclosures from Harold B. Siegel, Assistant Director, Bureau of Hearings and Appeals, Social Security Administration, to Robert M. Viles, Feb. 23, 1968.

[150] 20 C.F.R. § 404.908 (1967).

[151] *See*, J. WELLER, YESTERDAY'S PEOPLE 38, 56 (1966).

regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees.[152]

In order to invoke reconsideration a claimant or other party affected by the adverse initial determination must file a written request at a social security office within the six-month time limit permitted.[153] Additional evidence and contentions may be submitted.[154] The claim is reviewed at the appropriate payment center by employees different from, and presumably more experienced than, the ones who first passed upon the claimant's application.[155] If the initial determination is reversed in the claimant's favor, benefits begin or other relief is granted. If the reconsideration determination denies the claim, the claimant or other party must receive a statement of the grounds of denial and notice of the right to request a hearing before a Hearing Examiner.[156] The notice is similar to the notice of initial denial of the application, except that it may be more helpfully detailed in its explanation. Unless a request for a hearing is filed within six months from the date of receipt of the notice of determination of the reconsideration, that determination is final and binding on the parties.[157]

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[152] Flamm v. Ribicoff, 203 F. Supp. 507, 510 (S.D. N.Y. 1961). *Cf.* Saxon v. Celebrezze, 241 F. Supp. 152, 156 (W.D. S.C. 1965). Estoppel has been argued against application of res adjudicata, Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954) (estoppel argued inferentially); to preclude denial of a reopening request, Filice v. Celebrezze, 319 F.2d 443 (9th Cir. 1963); and to justify an extension of time for requesting review, Langford v. Flemming, 276 F.2d 215 (5th Cir. 1960). Its frequent appearance in claimant's arguments suggests that estoppel is merely a make-weight ground for attacking an adverse decision. Although the courts' easy dispatch of it may accurately and validly reflect its substance, the foundation for the dispatch—that everyone is presumed to know the law—is of course highly unrealistic, especially within the context of a social welfare program.

[153] 20 C.F.R. §§ 404.909–404.911 (1967).

[154] 20 C.F.R. § 404.913 (1967).

[155] "The reconsideration process is a thorough and independent review of the case. . . . [It] is made by a person other than the one who made the initial determination." HANDBOOK § 2005, at 329. Within the Bureau of Disability Insurance initial determinations are made by the Division of Benefit Services; reconsidered determinations, by the Division of Reconsideration. Social Security Administration, *Statement of Organization, Functions, and Delegations of Authority*, 32 Fed. Reg. 10,461, 10,462 (daily ed., Jul. 15, 1967) [hereinafter cited as Administration Statement].

[156] 20 C.F.R. § 404.915 (1967).

[157] 20 C.F.R. § 404.916 (1967).

2. *Administrative Hearing and Review*

By filing a written request[158] for hearing by a Hearing Examiner[159] within six months from receipt of reconsideration denial,[160] a claimant or other party whose benefits are affected by the reconsideration[161] can obtain his first and probably only opportunity to confront an administrative decision-maker who rules authoritatively on his claim.[162] However, the claimant may waive personal appearance before the Examiner, who then renders his decision solely on the prior-established record or "file" of the claimant's case.[163] Otherwise, unless he dismisses the case for lack of right to hearing[164] or certifies it directly to the Appeals Council,[165] the Examiner proceeds, with notice,[166] to hold an informal hearing which, like other administrative hearings, is conducted according to the Attorney General's Manual of Administrative Procedure, without application of such courtroom restrictions as rules of evidence,[167] orders of

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158 20 C.F.R. § 404.918 (1967).

159 After a reconsidered or revised determination, any person whose right to benefits is prejudiced by the Administration's determination, Social Security Act § 205(b), including a disability claimant, § 221(d), a claimant for entitlement to hospital or medical benefits, § 1869(b), and a claimant of hospital benefits, if the amount in controversey is $100 or more, § 1869(b), may request a hearing before a Hearing Examiner. In addition, any medicare provider of services or independent laboratory has the right to a hearing on the issues of its qualification to participate in the program. Section 1869(c). *See* Proposed Regulations, 20 C.F.R., Part 405, Subpart 0—*Providers of Services and Independent Laboratories: Determinations and Appeals Procedures*, 32 Fed. Reg. 18,054 (1967).

The hearing shall be conducted according to the provisions of Social Security Act § 205(b) and the regulations promulgated by the Secretary pursuant to §§ 205(a), (b). The hearing and review and other provisions of the Administrative Procedure Act also apply, 5 U.S.C.A. 556, 557 *et seq.* (1966), except insofar as their application to social security proceedings is modified by provisions in the Social Security Act or by exercise of the Secretary's authority thereunder. 5 U.S.C.A. § 559 (1966).

160 20 C.F.R. § 404.916 (1967).

161 20 C.F.R. §§ 404.919, 404.920 (1967).

162 *But cf.* note 209 *infra.*

163 20 C.F.R. § 404.934 (1967). *See* note 179 *infra.*

164 20 C.F.R. §§ 404.937, 404.935 (1967). The Hearing Examiner also may dismiss the case for abandonment if the parties fail to appear at a properly scheduled hearing without explanation or good cause. 20 C.F.R. § 404.937 (1967). In any instance of dismissal the Examiner must notify the parties and advise them of their right to review by the Appeals Council. 20 C.F.R. § 404.937a (1967).

165 20 C.F.R. § 404.939; *cf.* 20 C.F.R. § 404.941 (1967). The Council must give the parties notice of this action. 20 C.F.R. § 404.942 (1967).

166 20 C.F.R. § 404.923 (1967).

167 20 C.F.R. § 404.928 (1967). "[H]earsay is generally admissible if reliable and may be given such probative force as is warranted." Rocker v. Celebrezze, 358 F.2d 119, 122 (2d Cir. 1966).

pleading and argument, and the like.[168] The Examiner or any party may raise pertinent new issues for consideration;[169] either may invoke the Examiner's power to subpoena the appearance of witnesses and the production of documents.[170] The Examiner himself questions the parties and other witnesses, but he must permit the parties or their representative to do the same if they so desire.[171] In addition, "[t]he parties, upon their request, shall be allowed a reasonable time for the presentation of oral argument or for the filing of briefs or other written statements of allegations as to facts or law."[172] The proceedings of all hearings are transcribed in order to provide a record for subsequent review.[173]

In reaching his decision the Hearing Examiner of course applies social security law, that is, provisions of the Social Security Act, and the Internal Revenue Code regulations and rulings thereunder, and, if he is not to be reversed in an action for judicial review, the relevant precedents established by court decisions in social security cases. He shall also apply the state law upon which the Social Security Act depends for determination of family relationships, that is, the law of legitimacy, adoption, marriage, annulment, divorce, and so on, plus the state conflict-of-laws doctrines which govern in such matters, the effect of adjudications foreign to the insured person's domiciliary jurisdiction.[174] The Hearing Examiner must pass on the credibility of witnesses[175] and documents,[176] and in disability cases he must weigh the relevance and

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[168] "Hearings shall be open to the parties and to such other persons as the hearing examiner deems necessary and proper. The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the hearing examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing examiner may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing." 20 C.F.R. § 404.927 (1967).

[169] 20 C.F. R. § 404.924 (1967).

[170] 20 C.F.R. § 404.926 (1967). *See also* Social Security Act § 205(d)-(f).

[171] 20 C.F.R. § 404.929 (1967).

[172] 20 C.F.R. § 404.930 (1967).

[173] 20 C.F.R. § 404.931 (1967).

[174] *See* Social Security Act §§ 216(h)(1)(A), 216(h)(2)(A), *as amended.* The status of state ex parte decrees in domestic relation and probate proceedings is not clear. *Compare* Cain v. Secretary, 377 F.2d 55 (4th Cir. 1967) *with* Collins v. Celebrezze, 250 F. Supp. 37 (S.D.N.Y. 1966).

[175] *See* note 239 *infra.*

[176] *See, e.g.,* Clifton v. Celebreeze, 228 F. Supp. 251 (N.D. Tex. 1964).

materiality of eligibility determinations of the claimant's right to other benefits, e.g., workmen's compensation, unemployment compensation, and veterans' benefits.[177] Most importantly, he must support his resolution of factual issues by substantial evidence in the case record,[178] which shall be the entire basis for all of his considerations in reaching a decision.[179] The Hearing Examiner's decision must be accompanied by a written opinion which contains findings of fact and statements of reasons for the decision. A copy of the decision and opinion is mailed to the parties.[180]

The qualification, selection, appointment, status, compensation and discipline of Social Security Administration Hearing Examiners are conducted by the Civil Service Commission pursuant to the federal Administrative Procedure Act of 1946 and other legislation.[181] The qualifying standards for selection are rigorous. A candidate shall be admitted to the practice of law, shall have had at least seven years experience "in the preparation, presentation, or hearing of formal cases in courts of record or governmental regulatory bodies," and, during two years of the seven-year period immediately preceding his application, shall have had an aggregate of at least two years' practice in formal proceedings before federal or state regulatory bodies or in related court proceedings.[182]

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[177] "It is noted that the Employment Security Commission of the State of North Carolina has denied the plaintiff unemployment compensation because she is disabled and is therefore unavailable for employment. Although such a determination is not binding on the Hearing Examiner who must make an independent determination on the question of whether the plaintiff is able to engage in any substantial gainful activity . . ., the employment of the words 'not *determinative*' in the Social Security Regulations, 20 C.F.R. § 404.1525, plainly implies that if such a finding by another agency is not *determinative* of the issue then it is to be given *some* weight . . . , and must be considered along with the other evidence . . . . The Hearing Examiner, at the least, should have evaluated the standards by which the plaintiff was refused the compensation she claimed before such other agency to determine the significance of those standards." Smith v. Gardner, 251 F. Supp. 262, 268 (M.D.N.C. 1966) (citations omitted). *Cf.* Martin v. Ribicoff, 195 F. Supp. 761 (E.D. Tenn. 1961).

[178] *See* text corresponding to notes 228-240 *infra*.

[179] 20 C.F.R. § 404.939 (1967). It has been held improper for a Hearing Examiner to rely on medical texts not introduced into the hearing record. Colwell v. Gardner, 386 F.2d 56, 71-72 (6th Cir. 1967).

[180] 20 C.F.R. § 404.939 (1967).

[181] *See* 5 U.S.C.A. §§ 1305, 3344, 4301(2)(E), 5362, 7521, 5335(a)(3)(B) (1966). For an extensive chronicle of the turbulent rise of the Hearing Examiner corps and its present health, *see* Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B. J. 351 (1967). [hereinafter cited as Macy].

[182] CIVIL SERVICE COMM'N, HEARING EXAMINER 4-10 (ANNOUNCEMENT No.

There is no requirement that he be experienced in either social security law or the factual intricacies of claims adjudication, *e.g.*, disabling impairments and conditions.[183] In addition the candidate must submit to scrutiny of up to twenty-five references, pass an examination designed to measure his ability to write a decision, survive an oral interview about his job qualifications, and undergo a National Agency and Local Law Enforcement Investigation.[184] Successful completion of the qualification process entitles the candidate's name to be placed on a registry from which Hearing Examiner appointments are made. It is the practice for Social Security Administration Hearing Examiners to be appointed in periodic classes, at intervals from one to two years, each of which receives job orientation before assignment in the field.[185]

Social Security Hearing Examiners are all compensated at the federal employee level of GS-15 (which pays from 17,550 dollars to 23,013 dollars per year, depending on service), are afforded the amenities of personal secretaries, reporters, and private offices, and are subject to dismissal only for good cause, after hearing.[186] The caseload varies considerably among Examiners, but from eight to ten decisions per month seems to be a norm.[187]

Notwithstanding the statutory security of Hearing Examiners from pressures that might affect their impartiality as decision-makers, little is known about their actual, day-to-day independence within the institutional relationships and interactions of the Administration. They are under the supervision of the Bureau of Hearings and Appeals, a subagency within the Social Security Administration. The Bureau contains, among other components, an Appeals Council[188] which reviews decisions of Hearing Examiners; a Medical Advisory Staff, which "provides leadership and guidance in stimulating effective utilization of medical advisors

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318, *revised*, 1967). (The quote is from p. 5.) These requirements apply in the selection of all Examiners by the Civil Service Commission. It is reassuring to note that among the "principal types of positions in which qualifying experience is *not* obtained" are "teacher or professor." *Id.* at 6 (emphasis in original).

[183] The only qualification which is added for Social Security Administration Hearing Examiners to the general requirements is working knowledge in both English and Spanish for positions in Puerto Rico. *Id.* at 22.

[184] *Id.* at 12-15.

[185] It is estimated that less than one-fourth of the present roster of over 200 social security hearing examiners was selected prior to the implementation of the present selection criteria and process. *See* Macy 364-69.

[186] The pay scale at GS-15, raised in July 1968, ranges from $19,780 to $25,711 annually, varying according to service.

[187] In fiscal 1967 Hearing Examiners completed work in 20,081 cases. In previous years the number had varied from 12,788 in fiscal 1961 to 23,434 in fiscal 1966.

[188] *See* notes 201-221 *infra.*

. . . [by] hearing examiners"; a Division of Field Operations which "administers a nationwide organization of hearing examiners . . . provid[ing] administrative direction and guidance"; a Division of Program Operations, which "develops, appraises and issues operation instructions which provide basic information and promote equitable hearings"; and an Office of the Regional Hearings Representative, which, as the Bureau counterpart of the recent decentralization program of the Administration, "plans, organizes and administers regional programs for the scheduling and conduct, by hearing examiners, of impartial and independent hearings . . . [and] provides substantive guidance and administrative direction and leadership to the hearing examiners and their supporting staffs."[189] There would appear to be a limited number of tangible and intangible sanctions which the Bureau or the Administration can exert on Hearing Examiners. It has the authority to assign Examiners permanently and temporarily, to dreaded Siberias and on pleasant junkets.[190] More subtly it can—and apparently does—smother the Examiner with a cloak of recommended instructions, suggestive information, and other implicit indications of how an Examiner so disposed can win acceptance and favor in the larger organization. The artful devices of private consultations, public recognitions, confidential esteem, and the like, common in comparably organized institutions,[191] can and probably do exist to some extent in the interplay between Examiners and Administration overseers. There is no evidence to suggest frequent and undue intervention in the Examiner's decision-making by friends of claimants.[192]

The possible institutional inhibitions upon the Hearing Examiner's impartiality, or balanced partiality, between claimant and Administration, are overshadowed by his position in the hearing process. In a case in which hearing has been waived, the Examiner is the sole person involved in deciding the case. Unless the claimant is represented by counsel, he is equally alone in a hearing. If the Examiner shall discharge his obligations as a judicial or quasi-judicial officer, he must at once represent the claimant, represent the Administration and render an independent decision. To describe this phenomenon there has come into use the metaphor of the Three Hats, explained in the following opening statement of a Hearing Examiner in a hearing:

> Let me say this—maybe I can ease your mind. In 99% of the cases, people come in without any representation. It is my job

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189 ADMINISTRATION STATEMENT 10,464.

190 *Id.*

191 The author has in mind the institution of the law school, composed in part of deans and tenured faculty members.

192 *Cf.* note 262 *infra.*

> to represent those people when they come in. It seems strange, but we use the terminology that we 'wear three hats.' We put on the first hat, and we represent the claimant, we present all the testimony on his behalf, and drag it out of him by questioning. We then represent the government, the Social Security Administration, and search the law—that's the second hat. We search our minds, and we search whatever other records are available, we search the evidence, and we present the best case that the government has. Then we turn around and put on the third hat, and we decide which evidence is most favorable, and in whose behalf. I could show you records, and they probably have them here, where in many instances we find the case we put on for the claimant is better than the case the government has, and we hold for the claimant. If it were otherwise, those same records would show all hearings are decided in favor of the government, which is not true. In fact, the records would probably show the preponderance of the decisions are in favor of the claimant. In other words, the Hearing Examiner has put on a better case for the claimant than was available for the Social Security Administration. As far as being involved in technicalities here, I'm afraid I'll have to disagree with you, but I'll put it to you this way: if at any time during the course of this hearing you feel we are straying afar and getting technical, as you put it, then I would suggest that you make a motion for a continuance. In that event I will give it a great deal of consideration, or I will try to change the whole line of questioning. But I have confidence in myself and in you that you will find this a most enjoyable hearing, and you will find the answers will come in an orderly fashion. You will find I conduct a hearing in a business-like manner, and that one answer will lead to a question, and the question will lead to an answer, and so on. I've heard many hearings. The last group of individuals who just left said they didn't know they could remember so much—that they were going to tell me so much. That is done by expertise in questioning. If at any time you should decide we should proceed, but if you feel that the questions become difficult to answer, or for some reason your memory fails you and you feel you need preparation, you may make a motion for continuance, and I will entertain it.[193]

When the Examiner's role is characterized as the extraction of information in a face-to-face confrontation with the claimant, there is little difference between him and the Claims Representative at the prior stage of adjudication. Except as questions may be weighted in the claimant's or the Administration's favor, or not at all, there are no Three Hats. Even in this limited conception of his role, the Examiner

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[193] Rausch v. Gardner, 267 F. Supp. 46 (E.D. Wis. 1967). *See also* Address by C. Bolton-Smith, in NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, 1966 SUMMARY OF CONFERENCE PROCEEDINGS 159.

should, however, be able to do a better job. With the entire case before him for decision and the prior administrative determinations as a starting point, he is better situated to use his skill and experience for assuring that the case record will contain all the relevant information and that the claimant will have had opportunity to respond to evidence adverse to him. Because of his authority and independence the Examiner is in a better position in a disability proceeding to obtain full medical records from claimant and Administration physicians and to confirm that no evidence was overlooked in the disjunctivity of the initial and reconsideration steps. Under this conception of the Three Hat process more than one attorney appearing for the claimant but sitting mute during the Examiner's thorough interrogation of the claimant and witnesses has wondered what he is doing to earn a fee.

In truth the Hearing Examiner often wears more than three hats, and the hearing process is always broader than the hearing itself. The Examiner is potentially investigator, counselor, advocate, father confessor, judge, jury, and defendant. Unlike Hearing Examiners in other agencies, he not only hears testimony and examines witnesses; he must decide the case. The earlier discussion of Ed Sizemore's age and disability disputes have pointed to the adversarial implications of conflicts in evidence and the rules for resolving the conflict, and even the Three Hats metaphor suggests that the hearing process is adversarial. The overriding difficulty for the Examiner who wears his Three Hats seriously is not in the immediate and visible function of asking questions in a hearing. It lies instead in the ultimately impossible task of simultaneously or consecutively building the best possible case for the claimant by discovering, interpreting, construing, organizing, and presenting infinitely variable evidence most favorable to his position; of similarly making the best case for the Administration, which has denied the claim; and then of impartially finding a winner. If the attorney for the claimant would earn his fee, he should do his work before the hearing. He must read the law; more importantly, he must have discovered, prepared, and ordered the factual evidence into a strategy of proceeding that lays the factual and legal basis for the Examiner's opinion supporting a decision for his client.

In doing so the claimant's attorney has knocked the Three Hats askew and revealed the proceeding for what it really is. Either the Examiner responds to his advocacy by treating it as a judicial or adversary process, in which under one fewer Hat he moves to the no less comfortable position of representing the Administration and deciding impartially at the same time, or he retreats into the decision-making framework of the administrative adjudicator, for which the Administration's rules and regulations, and presumably the assistance which the

Bureau affords expressly to him, are designed. By the former reaction he is likely either to accept or to reject the claimant's argument, without really setting against it an equally well-advocated Administration case. By the latter reaction he simply fails to respond to the advocacy. It is clear that the choice between the alternative reactions carries with it a choice of law. If the issue is the claimant's disability, the choice is between the courts' policy-oriented law, which subordinates procedural rules to the goals of social legislation, and the Administration's rule-prescriptions, which obscure implicit but inarticulated policy choices underlying them.

The present two-part decision-making process directed by the courts in *Kerner* and subsequent cases,[194] in which the Administration has acquiesced, tends to tip the scales in favor of the Administration's preferences for adjudication. That the process is two-part affords the Examiner two sets of options and requires the claimant's attorney to surmount the separation if he will make the strongest case for his client.[195]

In the first of the two parts the claimant must show that he is disabled from performing his former job. Here the Examiner can choose between limiting his accounting to substantial "objective" evidence of medical impairments, or he can consider all evidence, including evidence of neuroses and such social diseases as chronic alcoholism and gluttonous obesity, and extending to the claimant's own declarations of how he feels physically and emotionally that relate to determining whether the claimant can do his prior work. If the determination is favorable to the claimant, the Examiner must proceed in the second part of the process to determine whether there exists substantial gainful activity in which the claimant can engage. The Administration provides the Examiner with a pool of contract witnesses, experts in "vocational counseling" and the like, from which he can draw an impartial testifier. Assisted by the inherent abstractionism of hypothetical questioning, the Examiner can ask the expert witness in what gainful activity can a person with the impairments, age, education, and work experience of the claimant, as determined in the first part of the proceeding, engage? Before repeated court rejections of the practice,[196] the witness responded with lists of light-work jobs gleaned from the federal Dictionary of Occupation Titles and other national compilations. Recently he has relied upon similar but narrower directories for a state or region.[197] In either way it has been

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[194] *See* note 80 *supra.*

[195] *Cf., e.g.,* Reimer v. Secretary, 274 F. Supp. 478, 481 (D.N.H. 1966).

[196] *But cf.* Jordan v. Gardner, 369 F.2d 384 (7th Cir. 1966); Gardner v. Brian, 369 F.2d 443, 448-449 (10th Cir. 1966) (dissenting opinion).

[197] *See, e.g.,* Boyd v. Gardner, 377 F.2d 718 (4th Cir. 1967).

easy for him to provide relatively general information having little necessary correlation to whether the claimant before him, if he is reasonably diligent, can find a source of income in employment. The Examiner may, however, devise his questions so that they relate to the specifics of the claimant's situation and thus compel the witness (who may know nothing about the claimant except that which he learns during the hearing) to give comparatively specific answers about actual jobs reasonably accessible to the claimant.[198]

At both stages of the hearing process the services of the claimant's attorney may be crucial, either in conducting cross-examination of witnesses,[199] including the claimant, to place in the hearing record evidence which the Examiner chooses to disregard as "non-objective" or otherwise immaterial or irrelevant, or in assisting an Examiner less restrictive in his evidence-taking to bring out the particularities of his client's employment potential.[200]

In light of the divergency between Hearing Examiners who carry out their jobs as administrative decision-makers and those who act as judicial decision-makers, including the shades of orientation between the poles, it might be surmised that the Appeals Council, sitting as a single appellate reviewing agency, would exercise its powers to achieve some uniformity and homogeneity. The Council's authority over Hearing Examiners' decisions is wide. On the one hand, it may on its own motion review a Hearing Examiner's dismissal of a request for a hearing or a decision on the merits,[201] consider a case certified to it by an Ex-

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[198] *Compare* text corresponding to note 240 *infra*, *with* note 98 of Part I.

[199] *See, e.g.*, Massey v. Celebrezze, 345 F.2d 146 (6th Cir. 1965). In fiscal years 1966 and 1967 the rates of Hearing Examiner reversal of administrative denials has been about 16% higher for hearings in which the claimant was represented by legal counsel. Of course this figure does not include the approximately 30% reversal rate upon court review of claims denied by Hearing Examiners and the Appeals Council.

[200] Social security regulations fail to provide for any right to the claimant and his representative to examine the contents of the claimant's case file during the course of administrative decision-making, before the record is made up which the Secretary must file with his answer to a claimant's action for review in federal district court. Social Security Act § 205(g). It is believed that as a general practice claimants and their attorneys on request can see the file or record before hearing or Appeals Council review. A problem arises, however, with respect to what is included within the file and, ultimately, within the record certified for court review. Interdepartmental memoranda (orders for medical examinations and the like) and other similar documents are removed; it is not clear to what extent information which may be relevant and material to the case is separated out. If the latter occurs a second question arises: does the removal favor the Administration, inasmuch as it is done by an Administration employee? *Cf.* note 209 *infra; but cf.* note 351 *infra.*

[201] 20 C.F.R. §§ 404.938 (dismissal), 404.947 (decision on merits) (1967).

aminer,[202] or remove a case before an Examiner into its jurisdiction.[203] On the other hand, the claimant or other party to an adverse decision by a Hearing Examiner may, within sixty days from receipt of the Examiner's decision, request review by the Appeals Council.[204] Failure so to do, coupled with failure of the Council to review the decision on its initiative, results in a final and binding decision.[205]

In most instances the Council denies requests for review.[206] However, if it does authorize review, it must make available, at cost, copies of the components of the record on which the Hearing Examiner's decision was based.[207] It shall permit them an opportunity to file written allegations and arguments.[208] The Council may receive new evidence that is relevant and material, whether introduced by the parties or obtained by the Council.[209] It may remand the case to a Hearing Examiner or decide it under the requirements imposed on Hearing Examiners, i.e., on the record, accompanied by a written opinion containing findings of fact and statements of reason.[210] The decision of the Council is final and binding on the parties,[211] subject to their right to bring an action in federal court for judicial review.[212]

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[202] 20 C.F.R. § 404.939 (1967).

[203] 20 C.F.R. § 404.941 (1967).

[204] 20 C.F.R. §§ 404.945, 404.946 (1967).

[205] 20 C.F.R. §§ 404.937b (dismissal by Examiner), 404.940 (decision by Examiner) (1967).

[206] The Council's authority to *deny* a request for review is discretionary. 20 C.F.R. § 404.947 (1967). The Council's authority to *dismiss* a request for review parallels the comparable authority of the Hearing Examiner. 20 C.F.R. § 404.952 (1967). In fiscal year 1966-67 the Council received 6,369 requests for review but conducted only 1,745 reviews. During the same time it completed consideration of requests for review in 6709 cases and reviews on its own motion in 358 cases.

[207] 20 C.F.R. § 404.948 (1967).

[208] *Id.*

[209] 20 C.F.R. §§ 404.943, 404.949 (1967). If the Council introduces the new evidence it must give the parties notice of its intention to receive it, and they shall have the opportunity to "comment" on it and to submit additional relevant evidence of their own. *Id. Cf.* McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964) (such opportunity required by Administrative Procedure Act § 7(a)); Cook v. Celebrezze, 217 F. Supp. 366, 369 (W.D. Mo. 1963) (such opportunity required by Administrative Procedure Act § 7(d)); Sosna v. Celebrezze, 234 F. Supp. 289 (E.D. Pa. 1964) (where claimant had no notice of their intended use, reliance on medical textbooks to support decision is grounds for reversal and remand).

The right of the claimant to appear personally before the Council is not clear. It seems to be limited to when the Council removes a case from an Examiner or takes it on certification from him. 20 C.F.R. §§ 404.941, 404.942. *But cf.* § 422.205, 32 Fed. Reg. 13,657 (1967).

[210] 20 C.F.R. §§ 404.944, 404.950 (1967).

[211] 20 C.F.R. § 404.951 (1967).

[212] Social Security Act § 205(g).

It is not clear from information published by the Social Security Administration or from other sources what functions the Council performs. It has eight members, including a Chairman and Deputy Chairman, who are not Hearing Examiners.[213] The Bureau's Division of Program Operations "provides centralized staff review of hearing examiner decisions to assist the Appeals Council in deciding whether to assume jurisdiction."[214] The review of cases in which the Council does take jurisdiction is conducted by a panel of two, three or more Council members or by a single member, depending on the procedural character of the case, although the Council reserves the discretion to consider any case en banc.[215] All of this information suggests that the Council operates as an independent judicial body.

However, the Chairman (and hence administrator) of the Council is also the Director (and hence administrator) of the Bureau,[216] which is, according to Administration orgchart representation, a line subagency responsible to the Assistant Commissioner, Field, of the Administration, the Commissioner and, through him, the Secretary of Health, Education and Welfare.[217] The description of the divisions within the Bureau suggests that they perform administrative functions, and the specific assignments to the Council to "recommend whether to request remand of the Secretary's final decisions appealed to the courts," to "obtain additional evidence and prepare supplemental decisions on remanded cases," and to "recommend whether an appeal should be taken to a higher court on court reversals of Secretary's decisions" suggest that the Council may have responsibilities in addition to the duty of impartial decision-making.[218] At any rate the Council reviews relatively few cases, chosen primarily from among those in which claimants have sought appeal,[219] and exercises its other appellate powers sparingly. It is impossible to determine the criteria by which it determines whether to take jurisdiction or decides the cases that it does formally review, especially since its decisions are not regularly reported,[220] and those favorable to claimants cannot be appealed.[221]

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213 1967-68 UNITED STATES GOV'T ORG. MANUAL 368 (1967).

214 ADMINISTRATION STATEMENT 10,464.

215 § 422.205, 32 Fed. Reg. 13,657 (1967).

216 1967-68 UNITED STATES GOV'T ORG. MANUAL 368 (1967).

217 *But cf.* note 216 *supra*. "The Bureau of Hearings and Appeals provides impartial hearings and reviews . . . ."

218 ADMINISTRATION STATEMENT 10,464.

219 *Cf.* note 206 *supra*.

220 Since 1960 the Social Security Rulings published by the Administration seem only to have reported two Appeals Council cases.

221 *Cf.* Social Security Act § 205(g), (h).

3. *Court Review and Appeal*

Section 205(g) of the Social Security Act declares that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides. . . .[222]

This provision, which alone authorizes the transfer of social security claims cases from administrative to judicial process,[223] has been uniformly and strictly construed as jurisdictional; unless the letter of its requirements are met the court is without jurisdiction.[224] Furthermore, the Act's requirement of a prior "final decision of the Secretary after a hearing" has been broadened to require exhaustion of administrative remedies, i.e., not only a hearing before a Hearing Examiner, which, without further appeal, would become final and binding on the parties, but also petition for review by the Appeals Council.[225]

The Act also prescribes the reviewing power of the federal court:

> The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary

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[222] *See also* Social Security Act § 216(j), 1869(b). "As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based." Section 205(g). By motion before filing his answer, the Secretary is empowered to obtain remand of the proceeding for further administrative action. § 205(g). In the period from July 1, 1965, to September 30, 1967, the Administration requested remands in 1035 cases; the claimant-plaintiff, in 118 cases. In addition, District Courts ordered 335 remands; Courts of Appeal ordered 20 remands. For the impact on attorneys' fees of granting the Secretary's motion of remand before answer, *see* text corresponding to note 312 *infra*.

[223] *But see* text corresponding to notes 272-278 *infra*.

[224] *See, e.g.*, Jamieson v. Celebrezze, 311 F.2d 506 (7th Cir. 1963), *cert. denied*, 374 U.S. 487. Failure to join the Secretary of Health, Education and Welfare as a party defendant has been held to be jurisdictionally fatal. Simmons v. United States, 328 F.2d 86 (3d Cir. 1964), *but see* 20 C.F.R. § 404.954(b) (1967) (promulgated June 30, 1964).

[225] *See, e.g.*, Harris v. Ribicoff, 200 F. Supp. 318 (N.D.W. Va. 1961), 20 C.F.R. §§ 422.21-.22; *but cf.* Langford v. Flemming, 276 F.2d 215 (5th Cir. 1960).

> as to any fact, if supported by substantial evidence, shall be conclusive. . . .[226]

Insofar as this authority does not differ in scope and kind from accepted canons of judicial review of administrative adjudication, nothing more needs to be said.[227] A perusal of disability cases reveals that judicial reversals in disability determinations are usually based on lack of substantial supporting evidence.

The Supreme Court of the United States has never ruled on the meaning of "substantial evidence" in a disability (or any other) social security case, and its attempts to clarify the term in similar contexts have not been especially successful.[228] District Courts and Courts of Appeal have reiterated the familiar but wondrous conceptual boundaries and magical flags associated with the term. Substantial evidence is "more than a scintilla, but there can be less than a preponderance."[229] The term "means evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred."[230] "[S]ubstantial evidence must do more than create a suspicion of the existence of the fact to be established."[231] This language suggests some kind of alchemist's scale balanced on the point of "substantial evidence" and marked off in "suspicions of existence," "scintillas," "substantial bases" (of the "supporting reasonable inferences" caste) and "preponderances," upon which evidence justifying an administration decision is placed in wisps, scoops, and lumps.

Even a more prosaic explanation of "substantial evidence," e.g., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[232] has little relation to what judges are doing when they overturn a disabiltiy determination ostensibly for lack of substantial evidence. In most cases they are reversing, with or without

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226 Social Security Act § 205(g).

227 *See* text corresponding to notes 68-70 in Part I.

228 "We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison v. Labor Board, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' Labor Board v. Columbian Enameling Stamping Co., 306 U.S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-20 (1965).

229 Coomes v. Ribicoff, 209 F. Supp. 670, 671 (D. Kan. 1962).

230 Sandusky v. Celebrezze, 210 F. Supp. 219, 222 (W.D. Ark. 1962).

231 Scott v. Celebrezze, 241 F. Supp. 733, 736 (S.D.N.Y. 1965).

232 Haxton v. Flemming, 183 F. Supp. 2, 4 (N.D. Calif. 1960).

remand, for failure of the administrative decision-maker to reach his decision in a way which courts find acceptable, i.e., for following the rules of administrative adjudication instead of judicial adjudication, as explored above. It is a question of rationality, not evidentiality: "[A]rbitrary or capricious action must be set aside."[233] "[I]f undue reliance has been placed upon one portion of the record to the disregard of overwhelming evidence to the contrary, then the Secretary's decision must be reversed."[234] Substantial evidence includes not only "basic evidentiary facts but also inferences and conclusions . . . reasonably draw[n] from the evidence."[235]

The following evaluations of the Hearing Examiner's decision-making process articulate the attitude of the courts:

> [I]t is the duty of courts to examine meticulously the evidence, no matter how burdensome that duty is, because of the helter-skelter nature of the records in these cases, and not adopt the facile way of disposing of an injured applicant's case by reference to, and reliance upon, the statements of one or two physicians, as against the considered statements of many physicians and surgeons who have had more opportunity of examining and treating the applicant, more occasions of making medical reports upon him, and more expertness in diagnosis, as well as upon consideration of the facts reflected in the transcript as a whole.[236]

> The Referee's report tends to fractionalize the several ailments [of the claimant] and to treat each one in isolation as a clinical medical problem rather than treating it within the framework of Claimant's work, history, educational background, and age. He has, on the basis of this record, no educational background that would prepare him for a desk job, nor for any other type of sedentary employment that might reasonably be available to him. We feel that the Referee did not give sufficient weight to these considerations.[237]

> We feel that the Hearing Examiner erred in so grounding his decision. The critical issue in this case was one which could not be resolved merely by determining what objectively observable physical changes had taken place in Mrs. Ber's bone and

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[233] Lewis v. Flemming, 176 F. Supp. 872, 874 (E.D. Ark. 1959).

[234] Rutledge v. Celebrezze, 240 F. Supp. 474, 475 (W.D. S.C. 1965).

[235] May v. Gardner, 362 F.2d 616, 618 (6th Cir. 1966). "To reverse the Secretary's decision, it is not enough that this court find that a decision to the contrary would also be reasonable, rather the court must come to the conclusion that the decision below was not rational." Reynolds v. Gardner, 271 F. Supp. 676, 677 (W.D. Va. 1966), *aff'd*, 381 F.2d 168 (4th Cir. 1967).

[236] Mefford v. Gardner, 383 F.2d 748, 761 (6th Cir. 1967).

[237] Underwood v. Ribicoff, 298 F.2d 850, 854 (4th Cir. 1962).

muscle structure as a result of her arthritic condition, and then placing these observable changes alongside other similar changes in other persons so as to measure arthritic conditions on an imaginary scale with calibrations ranging from "mild" to "severe." The ultimate question was whether the arthritic changes which had taken place in Mrs. Ber's body did, in view of her individual physical and mental makeup, cause pain which became so intensely severe to her that, as she testified, it forced her to quit working. . . .

The Hearing Examiner did not expressly indicate that he doubted the truth of Mrs. Ber's complaints of pain, nor did he deal in any systematic fashion with the medical reports which discussed the pain and its effects.[238]

Neither in law nor in logic is there ground for insisting that proof of disability shall rest solely upon the clinical findings, and that the subjective reaction to undisputed determinations of physical impairments be crossed out of the Equation merely because no machine has been invented to calibrate pain or to determine precisely its incapacitating effects upon different individuals. The affirmative proof of Mrs. Mode's disability is uncontradicted; and there is no evidence to the contrary. The application has been pending now for nearly four years, and we see no reason to remand the case for the taking of further testimony.[239]

[T]he Secretary has applied too strict a standard in this case. Not only must "[t]he capabilities of the individual . . . be viewed in context with his own physical, educational and vocational background," . . . but also the following question must be asked and resolved: "[W]hat employment opportunities are there for a man who can do only what applicant can do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."

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[238] Ber v. Celebrezze, 332 F.2d 293, 298-99 (2d Cir. 1964).

[239] Mode v. Celebrezze, 359 F.2d 135, 137 (4th Cir. 1966). "The Examiner had the opportunity to hear and observe the witnesses who testified, including the claimant as she described her impairments, her aches and her pains. He was convinced that she did experience pain but concluded, after considering *all* the evidence, both objective and subjective, that she had persuaded herself that she was not able to work and therefore had no motivation to continue. Considering the evidence as a whole the Examiner appears to have applied the tests approved by this court in Underwood v. Ribicoff, 298 F.2d 850 (1962) . . ., in determining that claimant's impairments were not disabling within the meaning of the Act. . . . Upon a hearing *de novo* we might reach a conclusion contrary to that of the Examiner but that is not the test." *Id.* at 137-38 (dissenting opinion). "The limited function of this Court does not include a review of the Secretary's decisions on credibility, unless a clear abuse is present, Lackey v. Gardner, 1A UNEMP. INS. REP. ¶ 14,852 at 2447 (N.D. Ga. 1967). *See also* Culbertson v. Celebrezze, 228 F. Supp. 208, 209 (E.D. Wis. 1964). "There is no doubt but that in some cases it may be difficult for the hearing examiner to make such findings [as to what other occupations, if any claimant is able to engage in, and as to what actual opportunities there are for

> . . . Second, when the record is tested by the principles set forth above, there fails to appear substantial evidence to support a finding necessary to the Secretary's determination of no disability, viz., that there existed a reasonable opportunity for Hodgson to engage in substantial gainful employment. Neither the bare suggestion in a medical report that the claimant might be able to operate an elevator nor the less specific allusions in the reports to "a sedentary job," "some standing job" and "one in which walking is at a minimum" constitute such evidence.[240]

It is not surprising that judicial review of a disability case frequently suggests an order remanding it for reception of additional evidence or first-hand reconsideration of the evidence in the record. "When it finds no substantial evidence to support the Secretary's ruling, the District Court can either remand the case for further administrative hearings or instruct the Secretary to commence disability payments immediately."[241] Although the basic criterion in exercising the discretion is "whether more evidence is necessary to develop the facts necessary to determine the cause,"[242] courts in declining to remand frequently emphasize the injustice of penalizing the claimant by further delay.[243]

The decision of the District Court is subject to appellate review "in

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claimant to engage in such occupations in the general area where he lives]. The medical reports may often be of limited usefulness in resolving such issues. The claimants themselves will often be uneducated and not represented by counsel. The hearings at which the evidence is presented to the examiner are usually brief, with no cross-examination. But none of this relieves the examiner of his duty to make express findings as to claimant's ability to engage in substantial and gainful activity. The examiners who hear these cases are, after all, specially skilled in bringing together the medical, psychological, historical, educational, and economic data on disability claimants and arriving at judgments as to their qualifications for benefits under the Act." Goodwin v. Gardner, 250 F. Supp. 454, 459 (N.D. Calif. 1966). *Cf.* Karas v. Celebrezze, 223 F. Supp. 185, 187 (E.D. Pa. 1963). *But see* note 143 *supra.*

[240] Hodgson v. Celebrezze, 312 F.2d 260, 263-64 (3d Cir. 1963) (citation omitted).

[241] Moke v. Celebrezze, 236 F. Supp. 174, 177 (N.D. Calif. 1964) (construing Social Security Act § 205(g)).

[242] Hupp v. Celebrezze, 220 F. Supp. 463, 464-65 (N.D. Iowa 1962).

[243] *See, e.g.,* Cooke v. Celebrezze, 365 F.2d 425, 428 (4th Cir. 1966), and text corresponding to note 239 *supra.* There may be an additional reason for choosing not to remand. When the court remanded a proceeding with express directions to determine whether the claimant, his impairment established, could nevertheless engage in substantial gainful activity, the "Appeals Council of defendant completely approved of what was practically a retrial of the impairment branch of the claim. . . . The strange sort of practice followed had no basis either in our opinion, the governing Act or otherwise." Hodgson v. Celebrezze, 357 F.2d 750, 752 (3d Cir. 1966). *But cf.* Rush v. Gardner, 273 F. Supp. 753 (N.D. Ga. 1967).

the same manner as a judgment in other civil actions."[244] Appeal from a remand decision has been dismissed because "the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment. . . ."[245] In reviewing District Court judgments Courts of appeal have regarded their authority and duty as "not limited to a mere determination of whether . . . [the District] court misapprehended or misapplied the substantial evidence test . . . but . . . instead [as] no different than that of the district court in reviewing the Secretary's findings."[246]

B. Restarting the Claims Process After Final Decision

It is not surprising that a claimant occasionally gives up at some point in the chain of decision-making, thus incurring a final and binding decision against him,[247] and that thereafter he decides again to seek benefits. If the grounds for the subsequent attempt are substantially different from the ones supporting the prior claim, restarting the claim process is simply a matter of filing a new application, which is treated entirely separately from any earlier applications.[248] If, however, the subsequent attempt is based on the same or nearly the same evidence, which is often true for reassertions of disability claims,[249] the matter is not nearly as simple. It is advantageous to review the prior claim because the right to benefits begins on the earliest date on which entitlement is established, limited to one year's retroactivity prior to date of application.[250] Moreover, during the time which has elapsed since filing

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[244] Social Security Act § 205(g). Hence, the Secretary can appeal a decision of a District Court adverse to the Administration.

[245] Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967) (applying 28 U.S.C. § 1291). An order denying a motion for summary judgment has been held, under 28 U.S.C. § 1291, to be appealable, Gardner v. Moon, 360 F.2d 556, 558 at n. 2 (8th Cir. 1966), and not appealable, Duke v. Gardner, 1A UNEMP. INS. REP. ¶ 14,907 (5th Cir. 1967).

At any rate the disposition of a case on court remand is more likely than not to favor the claimant. Of the 1338 proceedings remanded by courts which were concluded between July 1, 1963, and September 30, 1967, 978 were favorable to the claimant; 70, partially favorable; and 290, unfavorable.

[246] Celebrezze v. Bolas, 316 F.2d 498, 501 (8th Cir. 1963). *Cf.* Underwood v. Ribicoff, 298 F.2d 850, 851 (4th Cir. 1962).

[247] *See* text corresponding to notes 149-150 *supra.*

[248] *See* Social Security Act §§ 202(i), 202(j)(2), 216(i)(2), 223(6).

[249] *See* note 130 *supra.*

[250] Social Security Act §§ 202(j)(1), 223(b); *see* Craig v. Secretary, 1A UNEMP. INS. REP. ¶ 15,163 (W.D. La. July 8, 1968), Sangster v. Gardner, 240 F. Supp. 638 (W.D. Mich. 1965), *supp. order vacated,* 374 F.2d 498 (6th Cir. 1967).

his earlier application for benefits, the claimant's disability insured status may have expired.[251]

For these reasons it is important for the claimant to determine whether instead of filing a new application, he can overcome the "binding and final" decision against him on his prior application and resume its prosecution by further appeal. The Social Security is silent on the question, but the Administration's regulation and practices speak to it.

The doctrine of *res judicata* is applicable at every stage to bar redetermination of a prior adjudgment; regulations specifically authorize a Hearing Examiner to dismiss on *res judicata* grounds a request for a hearing.[252] The doctrine is also applied by a majority of the courts.[253] Regulations do provide, however, for "reopening" a binding and final decision for "revision"[254] and for granting a "time extension" for invoking the next stage of decision-making.[255] In the words of Judge Friendly, these regulations are "a model of what regulations addressed mostly to laymen—or even to lawyers—ought not to be. . . ."[256]

In order to obtain either a reopening or a time extension the claimant must show "good cause."[257] "Good cause" is defined to include (1) new and material evidence, (2) clerical error and (3) decisional error patent on the supporting evidence.[258] Although the application of the definition is not clearly stated, it is apparent from caption, context and reason that it applies only to good cause for reopening. If the two methods for revivifying a prior determination shall be functionally distinct, good cause for time extension must consist of sufficient reasons for delay, e.g., incarceration in an institution, and not of reasons that affect the decision itself.

The Administration seems liberally disposed to grant extensions of the six month's time for requesting a reconsideration of an adverse initial determination. Good causes for its extension include physical incapacity (such as blindness), mental incompetency, illiteracy, and

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[251] *See* note 130 *supra.*

[252] 20 C.F.R. § 404.937(a) (1967).

[253] The leading case is Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). "To permit the applicant to relitigate a claim after failure to obtain a court review within the statutory time would run counter to the apparent purposes and provisions of the [Social Security] Act." *Id.* at 759. *See* Rivers v. Celebrezze, 217 F. Supp. 141 (W.D. Va. 1963). *But cf.* Staskel v. Gardner, 274 F. Supp. 861 (E.D. Pa. 1967), quoted in text corresponding to note 335, *infra.*

[254] 20 C.F.R. § 404.957 (1967).

[255] 20 C.F.R. §§ 404.953 (reconsideration), 404.954 (hearing, administrative review, civil action) (1967).

[256] Cappadora v. Celebrezze, 356 F.2d 1, 3 at n. 1 (2d Cir. 1966).

[257] 20 C.F.R. §§ 404.953, 404.954, 404.957 (1967).

[258] 20 C.F.R. § 404.958 (1967).

illness. At the higher stages of administrative decision-making the liberality declines, and a petition to extend the time for requesting a hearing of Appeals Council review or for filing a civil suit is less likely to be granted. Rejections of requests for time extension are not among "initial decision" which by regulation a claimant has the right to appeal administratively.[259]

The Administration's practices for permitting final and binding decisions to be reopened have been codified by regulation: a decision can be reopened for revision[260] for any reason within twelve months after notice of initial determination has been mailed to the party claimant; for "good cause shown," between twelve months and four years after initial determination notice; and for certain enumerated reasons, *e.g.*, claimant fraud, adverse claim on the same earnings record, and discovery alive of a person ruled dead, "at any time."[261] Any party, claimant or Administration, can move to reopen;[262] however, the reopenings permitted "at any time" seem to lie solely in the Administration's favor. Like denials of time extension requests, denials of reopening petitions are not appealable "initial determinations."[263] In addition, for certain kinds of reopening, *e.g.*, to correct earnings records or to withdraw a benefit application, other regulations apply.[264]

If Ed Sizemore's application for benefits is denied on the grounds that he has not proved by adequate evidence that he is old enough to qualify for old-age benefits or so incapacitated as to qualify for disability benefits, and if he allows the decision against him to become final and binding by lapse of time, it is possible that at some later date he may obtain evidence which will more persuasively establish that as of the

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[259] *Cf.* 20 C.F.R. § 404.905 (1967). However, a decision by a Hearing Examiner denying a petition for a time extension for requesting a hearing is in effect a dismissal for failure to request a hearing within the authorized time limit, 20 C.F.R. § 404.937(c) (1967), a decision expressly appealable to the Appeals Council, 20 C.F.R. § 404.937a (1967).

[260] "Revision" can occur only upon a proper "reopening" of a determination, 20 C.F.R. § 404.956 (1967). For the parties' rights upon revision, *see* 20 C.F.R. §§ 404.961 -.963 (1967).

[261] 20 C.F.R. § 404.957 (1967).

[262] 20 C.F.R. § 404.956 (1967). Only the Appeals Council however, can revise a determination of the Appeals Council, *Id.* For the effect of intercession by the claimant's Congressman, Hon. Wilbur Mills, *see* Earnest v. Gardner, 1A UNEMP. INS. REP. ¶ 14,682 (E.D. Ark. 1967).

[263] See n. 259 *supra.*

[264] The time limits for correcting earnings records are set by the Social Security Act. Section 205(c). *See also* 20 C.F.R. § 404.960 (1967). There has been extensive litigation over the provision. *See, e.g.*, Martlew v. Celebrezze, 320 F.2d 887 (5th Cir. 1963).

Withdrawal of application of benefits (and request for revision of earnings records) is controlled by 20 C.F.R. §§ 404.615, 404.615(a). *See, e.g.*, Keller v.

date of the prior application he was qualified. How can he revive the decision against him to maximize his benefits or, if his disability coverage is so limited that it has expired, gain benefits at all?

First, the processing of a new application automatically reveals and places in consideration all former applications. The Claims Representative brings to date the claimant's "work-up," *i.e.*, new evidence is correlated with old.[265] After reviewing the entire file the Administration either finds that the former denial(s) rules the present claim under *res adjudicata* or that "new and material" evidence permits a reopening.[266] Ed Sizemore could, however, have specifically requested a time extension or reopening, alleging, respectively, a reason for delay, e.g., illiteracy, or new evidence going to the merits of the prior determination(s) against him, *e.g.*, more complete medical reports from his physicians.[267] It is not clear whether and to what extent the claimant is bound by the limitations of his request; it seems likely that the Administration will obtain from him and evaluate all evidence in light of his rights under *res adjudicata*, time extension, and reopening.[268]

If the denial of Sizemore's new application is based on *res judicata* or rejection of his actual or deemed request for time extension or reopening, can he obtain court review of the decision? In upholding denials of successive claims based on *res adjudicata*, the courts generally have reviewed, sometimes in passing, the appropriateness of the application of the doctrine by the administrative decision-maker.[269] Court decisions on their power to review denials of extension and reopening requests, however, have not been uniform, either in holding or in rationale, and the Supreme Court of the United States has failed to rule on the issue in a

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Gardner, 254 F. Supp. 919 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 554 (2d Cir. 1966); S.S.R. 65-17, 1965 CUM. BULL. 22.

[265] *See, e.g.*, Shultz v. Gardner, 282 F. Supp. 857 (W.D. Pa. 1968). In a disability case the state agency designated to make disability determinations as a practice orders new medical examinations by its consulting physicians.

[266] *Cf.* McMahon v. Ewing, 113 F. Supp. 95 (S.D.N.Y. 1953). Within four years, *see* text corresponding to note 261 *supra*.

[267] *Cf.* DeNafo v. Gardner, 272 F. Supp. 44 (D.N.J. 1967).

[268] The courts have tended to regard the three methods as doctrinally interconnected or indistinguishable. *See, e.g.*, Cappadora v. Celebrezze, 356 F.2d 1, 4 (2d Cir. 1966). Nevertheless, each device serves a distinctive purpose, is regulated by different law and implements a separate policy.

[269] *See* cases cited in note 253 *supra*. However, if the claimant has been denied a hearing by administrative application of res judicata, *see* text corresponding to note 252 *supra*, the court may refuse to review the denial on grounds of noncompliance in the requirements of § 205(g) of the Social Security Act. *See, e.g.*, Henderson v. Celebrezze, 239 F. Supp. 277 (W.D.S.C. 1965). It is submitted that the rule discussed in text corresponding to notes 275-278 *infra* shall be applied here. With respect to the Administration's waiver of res judicata by holding a hearing, *see* Staskel v. Gardner, 274 F. Supp. 861 (E.D. Pa. 1967).

Social Security case. The resolution of the issue depends on the interpretation of the exclusivity of § 205(g) of the Social Security Act as the jurisdictional basis of court review. Section 205(h) states that "no *findings of fact or decision of the Secretary* shall be reviewed by any person, tribunal, or governmental agency except as herein provided" (emphasis added), and "no action shall be brought under Section 24 of the Judicial Code of the United States to recover on any claim arising under this title."

Although the majority of courts find no authority for reviewing procedural denials,[270] there are two lines of argument favorable to the claimant. The first does not question the exclusivity of § 205(h) but relies on the literal meaning of § 205(g), that review can be obtained, "after any final decision of the Secretary *made after a hearing to* which he was a party" (emphasis added). Hence, if there has been a hearing at some time in the past prior to the procedural denial, the court has jurisdiction.[271] This distinction smacks of arbitrariness inasmuch as there may be little causal connection between the fact of a hearing and the procedural denial that is contested. Moreover, because the Social Security Act is silent on *res judicata,* reopening, and time extension, it is doubtful that Congress intended §§ 205(g) and (h) to apply to administrative decisions other than decisions on the merits.

The second line of argument contends that review of procedural denials is governed by § 10 of the Administrative Procedure Act, which states, in relevant part, that

> Except so far as (1) statute precludes judicial review or (2) agency action is by law committed to agency discretion—
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> (a) any person suffering legal wrong because of any agency

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[270] The leading case is Filice v. Celebrezze, 319 F.2d 443 (9th Cir. 1963). "Congress has not authorized judicial review of orders of the Secretary refusing to reopen prior final decisions. . . . [W]e think the rationale of Securities Exchange Commission v. Louisiana Pub. Serv. Comm'n, 353 U.S. 368 (1957), requires a holding that Section 405(g) does not authorize review of an order merely denying a motion to reopen a prior decision based on findings made following a hearing." *Id.* at 445. *See also* McCunney v. Gardner, 374 F.2d 110 (3d Cir. 1967).

[271] The leading case is Langford v. Flemming, 276 F.2d 215 (5th Cir. 1960) (extension of time for requesting review by Appeals Council of Hearing Examiner's decision); *cf.* Rosen v. Celebrezze, 254 F. Supp. 280 (N.D.N.Y. 1964) (extension of time for requesting a hearing; no jurisdiction under § 205(g) to review denial, because no hearing); *but see* Gardner v. Moon, 360 F.2d 556 (8th Cir. 1966) (extension of time for requesting a hearing; jurisdiction under § 205(g) to review denial upheld without consideration of limitation in § 205(g); Langford cited approvingly for standard of "good cause"); Clow v. Gardner, 257 F. Supp. 148 (E.D. Wis. 1966) (request for reopening and time extension for requesting a hearing; *Langford* cited as authority for court review).

action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * *

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judical review.[272]

Although a few courts have found power to review adverse procedural determinations by the Administration without reference to the Administrative Procedure Act,[273] it is beyond question that the Act is the proper statutory basis for a court's jurisdiction to review a decision not encompassed by § 205(g) of the Social Security Act.[274] In the leading case so holding, *Cappadora v. Celebrezze,* Judge Friendly declared:

> Although it could be argued that the second sentence of § 405(h) of the Social Security Act is a statutory preclusion of such review [of a decision not to reopen that had become a final and binding determination], the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than that provided in § 405(g). The question thus is whether the Act "so far" commits decision to reopen to agency discretion that a refusal would not be open to review even in case of abuse.
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> In this instance, review may seem unnecessary because of the benevolent role of the Social Security Administration and impracticable because of the volume of the agency's business. . . . On the other hand, a review of refusals to reopen, necessarily limited to abuse of discretion, would impose a relatively slight burden on the agency and the courts; a motion for summary judgment based on the administrative record is all that would be needed in the overwhelming bulk of cases. Moreover, being significantly limited in scope in order to respect the discretion vested in the agency, review of a refusal to reopen is not inconsistent with the scheme of the Social Security Act. The rule-making power conferred by the statute is not unlimited; rules and procedures established by the Secretary, in addition to being "not inconsistent" with the Act, must be "necessary and appropriate" for carrying out its purposes. 42 U.S.C. § 405(a). And once appropriate rules have been established, the discretion conferred in day to day administration cannot have been assumed to extend to unreasonable deviation from such rules on an *ad hoc* basis at the whim of the Administration. In this

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[272] Now codified in 5 U.S.C.A. 701(a), 702, 704 (1966).

[273] *See, e.g.,* Gardner v. Moon, 360 F.2d 556 (8th Cir. 1966), Kalb v. Gardner, 249 F. Supp. 1008 (S.D.N.Y. 1965).

[274] *See e.g.,* Julian v. Folsom, 160 F. Supp. 747 (S.D.N.Y. 1958).

> context, we do not believe that Congress would have wished to close the doors of the courts to a plaintiff whose claim for social security benefits was denied because of an unreasonable or inappropriate agency rule on reopening or because of a truly arbitrary administrative decision, e.g., that reopening would never be granted to Brooklynites. Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.[275]

Although the decision in *Cappadora* was preceded by an administrative hearing on a request construed to be alternatively for either a time extension or a reopening, it is submitted that it is the correct delineation of the scope of court review of all administrative determinations not on the merits and not expressly denied such review by provisions outside § 205(g),[276] provided of course that the plaintiff has exhausted his administrative remedies.[277]

As stated by Judge Friendly in the portion of the *Cappadora* opinion quoted above, the standard of review is whether the Administration has abused its empowered discretion, a standard that in most instances it will have met, so that "the merits are more easily determined than the court's jurisdiction to consider them."[278]

C. Representation of Claimants

1. *Limitation of Attorneys' Fees*

Prior to the enactment of the Social Security Amendments of 1965, the limitations on the fees which attorneys could legally charge or collect from social security claimants were relatively clear. The Social Security Act expressly authorized the Administration to "prescribe the maximum fees which may be charged for services performed in connection with any claim before the [Administration] under this title" and held that "any agreement in violation of such rules and regulations shall be void."[279] Any violation of the fee standards set by the Administration was made a misdemeanor punishable by a fine not exceeding

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[275] Cappadora v. Celebrezze, 356 F.2d 1, 5-6 (2d Cir. 1966) (reopening).

[276] *Compare* Social Security Act § 206(a) (1965) *with* § 206(a), *as amended* 81 Stat. 821, § 173 (13 U.S.C. CONG. & AD. NEWS 4641, Jan. 20, 1968), discussed in text corresponding to note 326 *infra*.

[277] 5 U.S.C.A. § 704 (1966).

[278] 356 F.2d 1, 7, *but see* Moreno v. Celebrezze, 1A UNEMP. INS. REP. ¶ 14,766 (W.D. Tex. Mar. 30, 1967) (jurisdiction to review denial of request to reopen held, following Cappadora; cause remanded for abuse of discretion of Hearing Examiner).

[279] Social Security Act § 206 (superceded). Section 206(a), *as amended*, 81

Stat. 821, § 173 (13 U.S.C. Cong. & Ad. News 4641, Jan. 20, 1968), applies to services of an "initial determination," including a claim for medicare entitlement or hospital benefits under Title XVIII. *See* note 147 *supra; cf.* 20 C.F.R. § 404.977(a) (1967), *as revised* 32 Fed. Reg. 7752, (1967).

The original Social Security Act of 1935 was silent on the question of representation of claimants for benefits. In 1939, however, § 206 was enacted with the following explanation: "While it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims, the experience of other agencies would indicate that where such services are performed the fees charged therefor should be subject to regulation by the Board [now Administration], and it is so provided. The provision is similar to 5 U.S.C. § 261 giving the Treasury Department comparable authority." H.R. Rep. No. 728 76th Cong., 1st Sess. 44-45 (1939) [hereinafter cited as 1939 House Report].

The action of Congress in extending fee regulation to social security claims was consistent with the policy that has resulted in the appearance of provisions limiting attorneys' fees in all or nearly all social welfare legislation. *See, e.g.*, Sen. Rep. No. 795, 90th Cong., 1st Sess. 6-7 (1967); (Appendix: D. Strickland, Limitations on Attorneys' Fees Under Federal Law, at 27-30, Supp. 1965, (A.B.A. Foundation Study 1961) [cited hereinafter as Strickland]. "The most important justification for fee limitations is that the claimant is in some respect incompetent. . . . Related to this reason are the arguments (a) that administrative officials have expertise for the use of claimant, and (b) that Congress has extended its charity to certain sectors of the public on its own terms. . . . The incompetency rationale is plain to see in the history of veterans' and Indian legislation. The veterans . . . were early the victims of enterprising claims agents. Indians exemplify even better a group which assumedly lacks the understanding to bargain on equal terms with a larger, alien society. . . . The argument from expertise . . . assumes that the claimants do not understand their rights in the premises. This is because the situation is at once too complicated and too simple: the law is too complicated to dispense with the need of administrative assistance; and the individual cases are uniform enough to make the application of expertise relatively simple. Therefore, the claimant can trust in the skill and good motives of the government and can dispense with expensive legal advice. The fact that the awards to claimants are regarded as acts of charity (or as "bounty") implies that the claimants are the objects of charity. Since Congress would not extend, arbitrarily, its charity to some and not to others, the true rationale of the charity argument must be, again, that the recipients are less competent than the public at large. In addition to the protection of claimants, the fee limitations are justified as protecting the Federal government and the public . . . [from] the manufacture of false claims and the fomenting of litigation." Strickland at 11-13 (author's footnotes omitted) [cited hereinafter as Strickland].

The Supreme Court of the United States has upheld the constitutionality of legislated fee restrictions, including their application in derogation of prior existing consensual contracts. *See, e.g.*, Calhoun v. Massie, 253 U.S. 170 (1920), and other cases collected by D. Strickland, cited above; *see also* note 281 *infra*. "No one, of course, questions the appropriateness of congressional regulation of the fees payable in connection with an award of benefits under a comprehensive, statutory plan for the support of disabled persons." McKittrick v. Gardner, 378 F.2d 872, 874 (4th Cir. 1967). Nevertheless, in both 1966 and 1967 Senator McClellan introduced a bill in the Senate to "remove arbitrary limitations upon attorneys' fees for services rendered in proceedings before administrative agencies of the United States," and to permit an attorney and his client to agree upon a fee, subject to review by the agency according to its published standards for reasonable fees and, failing agree-

500 dollars or by imprisonment not exceeding one year or both.[280] The Act was silent on representation before courts in connection with social security claims.

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ment, to appeal by the agency to a federal court for judicial determination of a reasonable fee. S. 1522, 89th Cong., 2d Sess. (1966); S. 1073, 90th Cong., 1st Sess. (1967). After disclosure by Mr. Charles M. Erisman, Director of the Bureau of Hearings and Appeals and Chairman of the Appeals Council, that S. 1522 as drafted would not apply to the Administration because it sought to remove only "fixed dollar" and "fixed percentage" limitations on attorneys' fees, *Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. 19 (1966) [cited hereinafter as *Hearing on Limitation of Attorneys' Fees*], the bill was specifically amended to include agency discretion to determine or approve attorneys' fees within the scope of its abolition. *See* SEN. REP. No. 1233, 89th Cong., 2d Sess. (1966). The Administration strongly opposed the bill, and its representatives were subjected to sharp and sustained examination at hearing. *Hearing on Limitations of Attorneys' Fees 19-31; see* note 64 of Part I. The bill was approved by the Senate and sent to the House in both years that it was introduced, but on each occasion it failed to emerge from the House Committee on the Judiciary. With respect to social security claims, its goal is accomplished in part by the 1967 Amendments to the Social Security Act. *See* text corresponding to note 322 *infra.*

In light of the foregoing it is not surprising that a recent attempt to overcome administrative control of attorneys' fees in social security cases failed completely. In Randolph v. United States, 274 F. Supp. 200 (M.D. N.C. 1967), *aff'd on motion per curiam without opinion,* 389 U.S. 570 (1968), an attorney sought a declaratory judgment that § 206(a) of the Social Security Act and administrative regulations promulgated by the Secretary of Health, Education and Welfare pursuant thereto are unconstitutional, because they violate the due process clause of the Fifth Amendment of the federal Constitution (right to counsel) and Article III, § 2 of the Constitution (encroachment on the judicial branch); constitute an unconstitutional delegation of legislative power to an administrative agency; and, with respect to the regulations, are not authorized under § 206. The District Court granted the defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The Supreme Court of the United States affirmed the dismissal.

[280] Social Security Act § 206(a), *as amended,* 81 Stat. 821, § 173 (13 U.S.C. CONG. & AD. NEWS 4641, Jan. 20, 1968). The crime is two-pronged, including both (1) intentional fraud or deception of a potential claimant or claimant and (2) knowing charge or receipt of compensation exceeding the maximum fee prescribed by the Administration. The second prong is very broad in application because the Administration's fee-setting power extends to services performed *in connection with* any claim for benefits. Section 206(a). *Compare* text of the provision imposing criminal penalties for charging or collecting fees exceeding the court allowance thereof. Section 206(b)(2), *see* note 288 *infra.* A conviction has been sustained for rendering services for a fee not approved by the Administration in the preparation of amended tax returns to qualify the taxpayer for social security benefits. United States v. Lewis, 235 F. Supp. 220 (E.D. Tenn. 1964).

It is anything but clear which work that a lawyer does for a claimant "in connection with" his claim for social security benefits. Presumably services for effecting an adoption to facilitate entitlement to child's benefits would be included, regardless of whether the attorney participated in the process of initiating or carry-

Under this legislation the fee restrictions for representation in administrative proceedings were severe. For representation on court review, however, they were minimal. The Administration provided by regulation that a duly appointed representative of a claimant might charge a fee of twenty dollars for services rendered at the initial or reconsideration stages and thirty dollars for assistance at the hearing or Appeals Council stages or fifty dollars in total.[281] All fees above such amounts required the approval of the Administration unit or hearing examiner at whose stage the work was done.[282] Although permission was obtainable for fees substantially higher, many attorneys apparently believed that they could not obtain compensation exceeding the twenty dollar and thirty dollar automatic allowances.[283]

On judicial review of the Secretary's determinations, the situation was entirely different. In the absence of controlling regulation the courts permitted attorney and client to determine the fee agreement,[284] using

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ing through the claim for benefits. Presumably legal actions growing out of the same facts, *e.g.*, a suit for personal injuries or for workmen's compensation benefits based on impairments that are also disabling under the Social Security Act, would not be "in connection with" the claim for social security benefits because the litigation has no direct bearing on the claimant's entitlement to social security benefits. However, the decision in a workmen's compensation case has some evidentiary relevance in a disability proceeding based on the same incapacitating conditions. *See* note 177 *supra*. While the vagueness of the language may be cured in the application of its "knowingly" requirement or by narrow judicial construction, it can be argued that as a criminal law the statute is unconstitutional on its face. *Cf.* STRICKLAND, *supra* note 279 at 8-10 and cases cited therein.

It is equally unclear to what extent the Administration uses the provision, openly or tacitly, as an ad terrorem device to keep attorneys in line. *See Hearings on Limitations of Attorneys' Fees* 30-31. For breach of the criminal provision or its regulations thereunder, the Administration is also empowered to suspend or prohibit any attorney from further practice before it. Social Security Act § 206(a), *as amended*, 81 Stat. 821, § 173 (13 U.S.C. CONG. & AD. NEWS 4641, Jan. 20, 1967); 20 C.F.R. §§ 404.978-404.981, *as revised*, 32 Fed. Reg. 7752 (1967).

Criminal penalty and the threat thereof are not the only devices available for enforcing fee restrictions. *See, e.g.*, Miracle v. Gardner, 391 F.2d 918 (6th Cir. 1968) (order, pursuant to Secretary's motion to show cause why a claimant's lawyer should not be held in civil contempt, requiring the lawyer to remit to the Court a fee collected in addition to the fee authorized by the Court).

[281] 20 C.F.R. § 404.976 (1967) (superseded). The Administration's fee regulations have been unsuccessfully challenged for permitting arbitrary fee-setting, Chernock v. Gardner, 360 F.2d 257 (3d Cir. 1966), and for unconstitutionality.

[282] 20 C.F.R. § 404.976 (1967) (superseded).

[283] *See, e.g.*, Gardner v. Menendez, 373 F.2d 488, 490 at n. 2 (1st Cir. 1967); *but cf.* note 320 *infra*. Part of the explanation for lawyers' misunderstanding of the $20-and-$30 rule may lie in the failure of the Administration to indicate, by regulation or otherwise, the standards of "good cause" for allowing a larger fee or the procedures for obtaining it.

[284] *See, e.g.*, Castille v. Secretary, 238 F. Supp. 340 (W.D. La. 1965); Carroll

their inherent power to set compensation primarily to protect plaintiffs incapacitated by minority or disability.[285] It was the practice of many attorneys to contract with claimants for a fee of fifty percent of all benefit payments accumulated on the date when the court, in reversing the Administration, ordered benefits to begin.[286] The fifty percent rate was justified for the reasons that (1) the compensation relationship was necessarily contingent because for many claimants the only source of payment was accrued benefits and (2) the rate of fifty percent, which might be a higher rate than the attorney would set contingently in other kinds of actions, was modest in consideration that the claimant—and his dependents—would become entitled to monthly benefits continuing into the indefinite future. Some courts assisted the lawyer in recovering his fee by directing the Administration to issue the back benefit check jointly to him and his client.[287]

It was not unusual for an attorney purposefully to attempt to manage his client's claim so that it would be denied administratively, authorizing an action for judicial review which, if successful, would permit collection of the fee for which he had obtained his client's agreement. The necessary delay in pursuing the claim through administrative denials into court would incidently sweeten the pot of accumulated benefits with which the size of the fee varied.

Congress included among the Social Security Amendments of 1965 a restriction on the court's inherent authority over attorneys' fees in social security cases. The new provision was demonstrably not a draftsman's jewel:

> Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the secretary may, notwithstanding the provisions of section 205(i) of this title, certify the amount of such fee for payment to such at-

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v. Celebrezze, 228 F. Supp. 24 (N.D. Iowa 1964); Sheppard v. Flemming, 189 F. Supp. 571 (S.D.W. Va. 1960); *but cf.* Robinson v. Celebrezze, 248 F. Supp. 149 (W.D.S.C. 1965).

[285] *See* Gardner v. Mitchell, 391 F.2d 582 (5th Cir. 1968); Celebrezze v. Sparks, 342 F.2d 286 (5th Cir. 1965); Folsom v. McDonald, 237 F.2d 380 (4th Cir. 1956); Gonzalez v. Hobby, 213 F.2d 68 (1st Cir. 1954); United States v. Blackwell, 238 F. Supp. 342 (W.D.S.C. 1965).

[286] *See* note 293 *infra.*

[287] *See, e.g.*, Celebrezze v. Sparks, 342 F.2d 286 (5th Cir. 1965). *Cf.* Social Security Act § 206 (b)(1). It is now the practice of the Administration, whenever a court awards benefits on review, automatically to withhold 25 percent of the claimant's back benefits pending judicial allowance of an attorney's fee.

> torney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.[288]

The problems of interpreting and construing the amendment have centered on the meaning of "judgment," "claimant," "may determine and allow," and "reasonable fee."[289] Through a succession of decisions the courts have resolved the ambiguities in the language and have developed procedures for applying the provision. There has remained, however, considerable uncertainty over the relationship between judicial fee determination and administrative fee determination.[290]

In the context of prior decisions establishing judicial power to award fees for representation in social security cases without special statutory authority,[291] it is possible to construe the 1965 amendment to apply only to a judgment in which the court, on its own initiative or upon an attorney's petition, decides discretionally to award a fee. Under this interpretation any agreement between a claimant and his attorney setting a fee of fifty percent of back benefits could stand legally under the statute. No court has so held,[292] undoubtedly because the brief Committee explanation of the amendment and the established policy of restricting fees in welfare actions made it clear that Congress intended for the 25% limitation to apply in all cases, for all other kinds of fee arrangements to be illegal, and for courts to pass upon all compensation for representa-

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[288] Social Security Act § 206 (b) (1). Subsection (2) states that "any attorney who charges, demands, receives or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both."

[289] Notwithstanding irate reaction among lawyers about unconstitutional impairment of contracts, the courts in consideration of the Congressional purpose behind it, *see* note 293 *infra,* have construed § 206(b) to apply in all cases favorable to claimants decided by courts after the enactment of the 1965 Social Security Amendments on July 30, 1965, and have upset prior existing agreements between attorney and claimant setting compensation at a rate exceeding 25 percent of accumulated benefits. *See, e.g.,* Lambert v. Celebrezze, 361 F.2d 677 (4th Cir. 1966); Redden v. Celebrezze, 361 F.2d 815 (4th Cir. 1966). *See also,* Hopkins v. Gardner, 374 F.2d 726 (7th Cir. 1967) *rev'd sub. nom.* Hopkins v. Cohen, 390 U.S. 530 (1968).

[290] *See, e.g.,* Gardner v. Brown, 387 F.2d 345 (4th Cir. 1967).

[291] *See* note 285 *supra.*

[292] *See, e.g.,* Wilson v. Gardner, 282 F. Supp. 287 (S.D. Ohio 1967), *but cf.* Holland v. Gardner, 1A UNEMP. INS. REP. § 14,649 (D.S.C. 1966) (court has discretion whether to set fees, but 25 percent limitation applies in all cases to restrict attorney-client contract).

tion before them.[293] The decisions of Courts of Appeal of the Fourth Circuit have implemented this categorical intention, thus rendering the "*may* determine and allow" into a "*must* determine and allow" except in the rare instance when an attorney does not petition for a fee.[294] A court may, however, approve a contingent fee contract within the 25% restriction if on review the compensation is found to be reasonable.[295] "Favorable judgment" includes a decision that remands a case for further administrative action, provided of course that the claimant ultimately is awarded benefits.[296]

One source of litigation under § 206(b) has been the question whether a lawyer's fee for representation of a social security claimant in court litigation is limited to a maximum of 25% of the accrued benefits of the litigating claimant or whether it also can include the same portion of dependents' benefits payable automatically upon determination of the primary insured's eligibility. Resolution of the question has great prac-

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[293] "It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in the Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the recovered benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

"The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 percent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. Any violation would be made subject to the same penalties as are provided in the law for charging more than the maximum fee prescribed in regulations for services rendered in connection with proceedings before the Secretary—up to $500, or a year's imprisonment, or both. In order to assure the payment of the fee allowed by the court, the Secretary would be permitted to certify the amount of the fee to the attorney out of the amount of the accrued benefits." SEN. REP. No. 404, 89th Cong., 1st Sess. 422 (1965).

[294] McKittrick v. Gardner, 378 F.2d 872 (4th Cir. 1967); Redden v. Celebrezze, 370 F.2d 373 (4th Cir. 1966). Courts of Appeals in other Circuits have not ruled expressly on this issue, but it may be presumed that they would hold similarly. *Cf.* note 295 *infra.*

[295] "Routine approval of the statutory maximum allowable fee should be avoided in all cases." Redden v. Celebrezze, 370 F.2d 373, 376 (4th Cir. 1966). It is not known to what extent federal courts in the Fourth and other Circuits do in fact allow the maximum 25% fee routinely. Practice may depend on whether the Circuit includes or excludes the accrued benefits of the claimant's dependents. *See* note 297 *infra.* Reduction of a requested maximum fee under § 206(b) for "professional help [to the court that] was as ineffectual and nonproductive as it was dilatory" is not unknown. Bailey v. Gardner, 1A UNEMP. INS. REP. § 14,658 at 2028 (E.D. Tenn. 1966).

[296] Conner v. Gardner, 381 F.2d 497 (4th Cir. 1967); Gardner v. Menendez,

tical significance. In many disability cases the sole issue is the wage earner's "disability" for entitlement to social security benefits; the determination of this question requires many months or several years of administrative and judicial decision-making and the ultimate award in his favor results automatically in payment of back benefits and continuing monthly benefits to his wife and children whether or not they were joined in the litigation. Inclusion of dependents' accrued benefits can often double the maximum attorney's fee payable out of claimant's benefits alone.[297]

In the absence of any clear indication that Congress in enacting § 206(b) considered or ruled on precisely this issue,[298] the outcome must be guided by broader Social Security Act policies toward legal representation of claimants and lawyers' compensation. In two circuits, United States Courts of Appeal restricted attorneys' fees to no more than 25% of the primary claimant's accrued benefits, arguing that the fortuitous appearance in a case of dependents whose benefits depend for their payment solely on determination of the principal claimant's entitlement should not affect the size of the attorney's fee.[299] In *Hopkins v. Gardner,* the Seventh Circuit Court of Appeals stated, "We think it unlikely that Congress intended that in cases like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single."[300]

On the other hand, in *Redden v. Celebrezze,* the Fourth Circuit Court of Appeals reasoned and held to the contrary:

> If Congress had intended the fee base to be limited to benefits payable on the primary claim, it would hardly have provided the means of its universal avoidance. The lawyer, seeking a larger fee, in every case could make the dependents parties to the administrative proceeding. With all claimants before the court, the limitation of § 406(b) (1) could not be confined to the benefits payable to one claimant only. For these reasons, we

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373 F.2d 488 (1st Cir. 1967); *but cf.* Duke v. Gardner, 264 F. Supp. 187 (N.D. Ga. 1967); Martin v. Gardner, UNEMP. INS. REP. ¶ 14,529 (E.D. Tenn. 1966).

297 *See, e.g.,* Redden v. Celebrezze, 370 F.2d 373 (4th Cir. 1966). "[T]he accrued benefits payable to Redden on his primary claim now amount to approximately $7,000, while those payable to him on behalf of his children and to his wife now aggregate approximately $9,000. If the $7,000 is the fee base, the maximum fee would be approximately $1,750, while if the fee base is $16,000, the maximum fee would be approximately $4,000." *Id.* at 375-76.

298 *See* note 293 *supra.*

299 Hopkins v. Gardner, 374 F.2d 726 (7th Cir. 1967), *rev'd sub. nom.* Hopkins v. Cohen, 390 U.S. 530 (1968); Sims v. Gardner, 378 F.2d 70 (6th Cir. 1967), *rev'd,* 88 S.Ct. 1443 (1968). The *Sims* case was reversed by the Supreme Court without opinion, citing only its decision in Hopkins.

300 374 F.2d 726, 730 (7th Cir. 1967).

> think the statutory words "past-due benefits to which the claimant is entitled by reason for judgment" mean the entire group of benefits payable to the primary claimant on his own behalf and to him and other dependent members of his family on their behalf.[301]

In a rare expression of willingness to adjudicate a Social Security question,[302] the Supreme Court of the United States granted certiorari in the *Hopkins* case and, by a division of five to three, reversed the Circuit Court decision and held in favor of including the dependents' accrued benefits in the computation of the maximum attorney's fees.[303] The opinion of Justice Douglas supporting the decision states that restricting a fee allowance only to the claimant's accrued benefits "seems to us to be too technical a construction of the Act which we need not adopt. In this instance, proof of the husband's 'claim'[304] results in a package of benefits to his immediate family; and those benefits of the head of the family who files the 'claim'."[305] The Justice further noted that nothing in the history of § 206(b)(1), imposing the 25 percent attorney's fee limitation on "accrued benefits," militated against the Court's decision.[306]

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[301] 370 F.2d 373, 375 (4th Cir. 1966).

[302] The Court's last social security case was Flemming v. Nestor, 363 U.S. 603 (1960). Discussed in note 24, *supra.*

[303] Hopkins v. Cohen, 390 U.S. 530 (1968).

[304] Court's footnote 5: "The record reveals that petitioner applied for benefits for his two children in his initial application for disability payments. Although that application did not encompass a claim for benefits on behalf of his wife, it is made clear in the application that his wife was also applying for benefits. It does not appear, however, whether the separate application for wife's benefits was filed by her or by petitioner on her behalf. See n. 3, ["See 20 C.F.R. §§ 404.603-404.604. Nor are the wife and children required to become parties to proceedings on review of an administrative determination. See 42 U.S.C. § 405(b) and (g); and 20 C.F.R. §§ 404.909-404.910; 404.916-404.919; 404.945; 404.951."]. No question is raised concerning the propriety of the claims that were filed. Nor is this a case where any question has been raised concerning the right of the wife or children to benefits. Rather, the wife and children had been receiving them as dependents of a disabled person until they were terminated by respondent's erroneous decision that the husband was no longer disabled. When that decision was reversed by the District Court, the only impediment standing in the way of the receipt of past-due benefits by the wife and children was removed. In a realistic sense, then, the attorney was representing fully the interests of the wife and children when he litigated the question of the husband's disability." Hopkins v. Cohen, 390 U.S. 530, 533 (1968).

There never has been question that a lawyer should not be compensated for representing a wife and children of a claimant when their entitlement depends on some determination *in addition to* establishment of the wage-earner's entitlement, *e.g.*, an issue of parental relationship or support. *See, e.g.*, Sims v. Gardner, 378 F.2d 70, 72 (6th Cir. 1967), *rev'd*, 88 S.Ct. 1443 (1968).

[305] 390 U.S. at 534.

[306] *Id.* at 534.

Justice White, joined in dissent by the Chief Justice and Justice Harlan, declared flatly his inability to agree with the majority rationale:

> Since petitioner was the sole claimant before the court, and the only party for whom his lawyer provided representation in that court, I cannot escape the conclusion that the lawyer was entitled only to a maximum of 25% of the past-due benefits payable to petitioner . . . As the Court makes clear, the purpose of § 206(b)(1) was to reduce contingent fee arrangements by limiting the maximum fees recoverable by attorneys. The Court somehow concludes that this clear legislative purpose militates for a construction of the statute which is against its clear wording and which has the result of once again permitting attorneys to obtain a very high percentage of the benefits payable to Social Security claimants.[307]

It is unfortunate that both the Court's opinion and the dissenting opinion in *Hopkins v. Cohen* fail even to mention the implications of the 25% limit as a *maximum* attorney's fee. Although a court may award the maximum fee in a routine fashion, thus permitting the impact of the *Hopkins* decision to oppose the Congressional policy expressed in § 206(b)(1), it need not do so and may, as previously required by the Court of Appeals for the Fourth Circuit, set a fee based on the *quantum meruit* of the lawyer's services in the case.[308] Viewed in this light, the *Hopkins* decision does not automatically result in higher attorney's fees, but instead provides an opportunity, especially in disability cases, for a lawyer to secure a larger fee which he proves to the court's satisfaction is his fair desert. Moreover, as explained in the opinion accompanying the Fourth Circuit decision in *Redden v. Celebrezze,* agreeing anticipatorily with *Hopkins:*

> Under our construction of the statute, the maximum limitation should be adequate to provide a reasonable fee for the lawyer who diligently prosecutes the case and brings it to an early conclusion, without forcing or encouraging him to bring in the dependents as formal parties in order to create the same maximum fee base which we find the Act provides. He is not discouraged from proceeding diligently and promptly before accrued benefits mount up; he is not encouraged to resort to obvious procedural devices for the enhancement of his own fee.[309]

For these reasons the decision in *Hopkins* is correct and wise. Hope-

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[307] *Id.* at 536.

[308] *See* note 295 *supra* and text at note 311 *infra.*

[309] 370 F.2d 373, 376 (4th Cir. 1966).

fully—not withstanding the failure of the Supreme Court to consider how the amount of a fee should be set—the case has laid to rest one, if only one, of the vexatious issues continually arising over attorneys' fees in social security cases.[310]

Inasmuch as the purpose of judicial supervision of legal compensation in welfare actions is the protection of the poor and enfeebled from rapacious feemongering, it would seem that *quantum meruit* is the proper standard for computing the award. It is the basis that has been established by the Administration for approving fees. However, in social security disability cases, as well as most other kinds of welfare compensation cases, the sole way by which the typical claimant can pay an attorney's fee is through a contingent fee contract. The lawyer rewarded under *quantum meruit* is properly compensated if his client wins a favorable judgment, and he is not compensated at all if he loses. Because contingent fee arrangements are essentially gambling contracts, the lawyer can never win, and his odds range between breaking even and losing completely. Chief Judge Haynsworth, speaking for the Court of Appeals for the Fourth Circuit in *McKittrick v. Gardner,* squarely faces the dilemma in explaining how the "reasonableness" of a fee shall be determined:

> The statute, as we construe it, imposes no great burden upon the courts . . . . The judge who has decided a case, need hold no evidentiary hearing to determine the extent and quality of the assistance he received from the lawyer in reaching his conclusion and in preparing an opinion.
>
> The judge may be assisted by a statement of the time spent by the lawyer, though such statements must be subordinate to the judge's evaluation of the lawyer's contribution to the decision. . . .
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> * * * *
>
> While the judge must approve the reasonableness of the fee in every case and may not unquestioningly endorse contingent fee contracts providing for a fee of not more than twenty-five per cent of the accrued benefits, there is no prohibition against his consideration of the contingency of compensation. Availability of lawyers to such claimants is of the highest importance, and if a lawyer is to receive no compensation unless there is an award, his compensation is contingent whether or not he has a contract that says so. Most of the disability claimants have no other resources for the payment of fees. The contingency of compensation, whether it stems from an employment contract or results from the claimant's indigency, is highly relevant in the appraisal of the reasonableness of any fee claim.

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[310] Apparently the Social Security Administration has acquiesced in the Hopkins decision in awarding fees for legal representation in administrative proceedings.

> The effective lawyer will not win all his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyers' risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.[311]

Although § 206(b) has in this way been translated from a highly ambiguous statute into a working procedure, one uncertainty remains. In regulating fees the courts have consistently observed a strict division between representation before the Administration and services rendered on judicial review. Consequently, in order to be compensated for all of his work in any case that at some time is within a court's jurisdiction, an attorney must petition both the court and the Administration for a fee and must meet the requirements for award established by each.[312] If a claimant prevails in court, his attorney can receive by order of the court compensation only for his work before it; he must look to the Administration for compensation for his earlier representation there. If a case appealed by action in federal court is remanded upon request of the Secretary before answer to the complaint, or thereafter upon judgment, and the claimant is awarded benefits administratively after the remand, his attorney may request fees from both the Administration and the court.

In the leading case of *Chernock v. Celebrezze*[313] the Court of Appeals for the Third Circuit ruled that an award of fees by the Administration is not subject to judicial review, notwithstanding the allegation that the award is "arbitrary, capricious and grossly inadequate." The court held that

> the order of the hearing examiner setting a maximum fee of $250.00 in this case is not reviewable by the Court, because the setting of fees for representation of claimants before the Secretary is committed to that agency's discretion by Section 206 of the Social Security Act, and judicial review is therefore

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311 378 F.2d 872, 874, 875 (4th Cir. 1967).

312 *See* Ray v. Gardner, 387 F.2d 162 (4th Cir. 1967); Gardner v. Brown, 387 F.2d 345 (4th Cir. 1967); Robinson v. Gardner, 374 F.2d 949 (4th Cir. 1967); Gardner v. Menendez, 373 F.2d 488 (1st Cir. 1967). "[W]e see every reason for continuing the principle that the agency before whom services were rendered should be the one to determine their value. . . . There is nothing singular in the fact that counsel who appears in two forums should apply to each for the aliquot part of his total fee. That is common practice where counsel obtains in a district court, and in an appellate court, a separate award for his services before each." *Id.* at 490.

313 360 F.2d 257 (3d Cir. 1966).

precluded by Section 10 of the Administrative Procedure Act.[314]

However, while § 206(b) has been undergoing continual clarification by the courts, the Administration has changed the rules for awarding fees for representation before it. By regulations effective May 27, 1967, all agreements and requests for compensation must be approved within the Administration; the former twenty dollar and thirty dollar exceptions are discarded.[315] Any representative, attorney, or non-lawyer who seeks remuneration must file a petition which specifies the dates, times, and kinds of services and expenses, the fee "desired," and certain other pertinent information.[316] In setting the amount of compensation the Administration shall consider the purpose of the Social Security Act, the services performed, the complexity of the case, the skill and competence required, the time spent, "the results achieved," the fee requested, and other factors.[317] Any services rendered before a state or federal court shall not be considered.[318] Hearing examiners are permitted by internal Administration authorization to allow a fee not exceeding 500 dollars. An award above that amount must be set or approved by the Office of the Director, Bureau of Hearings and Appeals (formerly by the Appeals Council), to which the attorney can appeal if he is dissatisfied with the Hearing Examiner's award.[319] Inasmuch as

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[314] *Id.* at 259.

[315] 20 C.F.R. § 404.975, *as revised*, 32 Fed. Reg. 7751 (1967).

[316] 20 C.F.R. § 404.976(a), *as revised*, 32 Fed. Reg. 7751 (1967). Expenses seem to be reimbursible apart from the fee awarded. A non-lawyer representative must also show "the special qualifications which enabled him to render valuable services to the claimant." 20 C.F.R. § 404.976(a)(6).

[317] 20 C.F.R. § 404.976(b) (1967), *as revised*, 32 Fed. Reg. 7751 (1967). "The results achieved" are explained parenthetically in this way: "While consideration is always to be given to the amount of benefits, if any, which are payable in a case, the amount of fee will not be based on the amount of such benefits alone but on a consideration of all of the factors listed in this section. The benefits payable in a given claim are governed by a specific statutory provision and by the occurrence of termination, deduction, or nonpayment events specified in the law, factors which are unrelated to efforts of the representative. In addition, the amount of accrued benefits payable in a given claim is affected by the length of time that has elapsed since the claimant became entitled to benefits." *Id.* In the proposed regulations earlier published by the Administration the equivalent material omitted the last sentence and stated the following in place of the present first sentence: "However, results achieved are not measured by the total of benefits actually or potentially payable in a case." Proposed Rule Making, 31 Fed. Reg. 15,199 (1966).

[318] 20 C.F.R. § 404.974 (1967), *as revised*, 32 Fed. Reg. 7751 (1967).

[319] 20 C.F.R. § 404.906 (1967), *as revised*, 32 Fed. Reg. 7750 (1967), *as revised*, 33 Fed. Reg. 3060 (1968). Determination of a fee "*may* receive administra-

the Administration previously had authorized, upon petition detailing the work done, fees substantially exceeding the twenty dollar and thirty dollar limits below which approval was not required,[320] the foregoing regulations represent codification and publicity of prior administration practices.[321] A more significant change is the recent internal order raising from 300 dollars to 500 dollars the maximum fee which a Hearing Examiner is authorized to determine.[322]

With the Social Security Amendments of 1967 Congress added two sentences to § 206(a) moving at least one step further the process of drawing together the fee-setting criteria and procedures of the courts and of the Administration:

> Whenever the Secretary, in any claim before him for benefits under this title, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this title, the Secretary shall, notwithstanding section 205(l), certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney for such attorney's services.[323]

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tive review." *Id.* (emphasis supplied).

[320] In calendar year 1966 Hearing Examiners authorized the fees requested in 78.2 percent of the 493 petitions presented to them; the Appeals Council, 40.8 percent of 338 petitions. The average fee requested from Hearing Examiners was $290; the average awarded, $228. The Council honored 338 requests for an average fee of $679; it approved an average fee of $497, including 165 fees varying from $500 to $1,600. In 1967 Hearing Examiners granted the requested fee in 80% of 818 petitions. The average requested fee was $284; granted, $252. The Office of the Director of the Bureau of Hearings and Appeals awarded the requested fee in 62.6% of 391 requests. The average requested fee was $890; the average awarded was $700. The Office allowed 253 fees over $500, running to $2,500.

[321] One acute difficulty for some attorneys, the stated policy of the Administration not to assist in collecting authorized fees by paying them directly as deductions from the claimant's accrued back benefits check, was not affected by the 1967 changes in fee regulations. It was, however, removed by the 1967 Amendments to the Social Security Act. *See* text corresponding to note 323 *infra*. The Administration, modifying policy in practice, apparently for some time previously assisted at least some attorneys, upon request and with client permission, in obtaining authorized compensation by issuing the check for accrued benefits jointly to them. *But cf.* Swotes v. Gardner, 392 F.2d 428 (3d Cir. 1968).

[322] *See* note 320 *supra*.

[323] Social Security Act § 206(a), *as amended*, 81 Stat. 821, § 173 (13 U.S.C.

The crucial language is "a reasonable fee to compensate such attorney in connection with such claim." Does it refer only to claims before the Administration which have not at any time been within a court's jurisdiction? To all claims except such portions of any of them that may have been within the jurisdiction of a court at some time? To the entire proceeding of every claim culminating in an administrative award of benefits, not excepting a claim that may have once been before a court and thereafter remanded? In short, does the provision purport to extend the authority of the Administration for determining fees to include representation on judicial review? In light of the strict distinction between Administration and court services presently observed in setting fees, it seems unlikely that the provision will be construed to so expand the Administration's authority.[324] However, the provision makes an additional change potentially significant. It reduces the Administration's prior authority to "prescribe maximum fees" for the service of attorneys as well as other representatives to authority to "fix reasonable fees" for attorneys. If the Administration sets an arbitrary or "unreasonable" fee, *e.g.*, a fee based on *quantum meruit* standards that do not take into account the contingent nature of the attorney's compensation,[325] the courts should find authority in § 10 of the Administrative Procedure Act to upset the determination upon review initiated by the dissatisfied lawyer.[326]

In the absence to date of administrative regulations or court decisions construing and applying the additional sentences of § 206(a), it is a matter of conjecture whether it has paved the way for eliminating the division in fee-setting practices between representation before the

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CONG. & AD. NEWS 4641, Jan. 20, 1968). The provision was added on the floor of the Senate to the Social Security Amendments bill as passed by the House and reported from the Senate Finance Committee. It was introduced by Senator Ervin, who explained that its purposes were to enable the Administration to pay counsel fees directly from a benefit award and to set the guidelines for administrative allowance of fees comparable to those set for court allowance. The Department of Health, Education and Welfare indicated that it had no objection to the change, which was approved by voice vote. 113 CONG. REC. 16,610 -611 (Nov. 16, 1967). The amendment was included in the reconciliation of House and Senate versions of the bill reported by the Conference Committee and enacted into law. CONFERENCE REPORT No. 1030, 90th Cong., 1st Sess. (13 U.S.C. CONG. & AD. NEWS 5523, Jan. 20, 1968). By not removing the portion of § 206(a) which had authorized the Administration to regulate fees for representation, it can be inferred that Congress intended to preserve the authority, and the regulations thereunder, for controlling the compensation of non-lawyer representatives.

[324] *See* note 312 *supra.*

[325] *Cf.* text corresponding to note 311 *supra.*

[326] *See* text corresponding to notes 272-77 *supra; cf.* text corresponding to note 314 *supra.* "We think it would be appropriate for a Federal court to review what has been done [by the Administration in allowing or disallowing an attorney's fee in an administrative proceeding]. *Hearing on Limitation of Attorneys' Fees* 22.

Administration and representation before the courts. The triad of alternative standards closely copies the criteria fashioned by the courts under § 206(b)(1), the language of which can be construed to limit its applicability to cases in which the court renders a "final judgment"—not including a remand—"favorable to a client." There is some indication in the regulations published by the Administration in May 1967 that it intends for judicial allowance of fees for all services rendered by an attorney in a proceeding in which the court enters a final judgment ordering the Administration to begin paying benefits.[327] Moreover, that Congress did not intend to enable attorneys to obtain fees amounting to fifty percent of accumulated benefits, *i.e.*, twenty-five percent from the court and twenty-five percent from the Administration in a case before both, infers a preference for a single fee determination within either the twenty-five percent limit under § 206(a) or the same limit under § 206(b)(1).[328] The abstraction entailed in splitting the work of an attorney into two parts and the inconvenience of applying twice for a full fee should be overcome by coordination between the courts and the Administration requiring the decision-maker finally awarding benefits to allow a single fee for all of an attorney's services in the entire proceeding, subject to judicial review of administrative determinations for unreasonableness.[329]

2. *Right to Representation*

At the same time that the limitations on attorneys' fees and un-

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[327] "Proceedings before a State or Federal court. (a) *Representation of claimant in court proceeding.* Any service rendered by any representative in any proceeding before any State or Federal court shall not be considered services in any proceeding before the Social Security Administration for purposes of §§ 404.973 and 404.975. However, if the representative has also rendered services in connection with the claim in any proceeding before the Administration, as defined in § 404.977a, he must specify what, if any, amount of the fee he desires to charge is for services performed before the Administration, and, if he charges any fee for such services, he must file the petition and furnish all of the information required by § 404.976(a)." C.F.R. § 404.974 (1967), *as revised*, 32 Fed. Reg. 7751 (1967). The second sentence was not included in the proposed regulations. Proposed Rule Making, 31 Fed. Reg. 15,199 (1966). Although it does not clearly indicate that the attorney shall submit his § 404.976(a) petition to the court instead of the Administration, in context the provision seems to be an exercise of the Secretary's authority to "prescribe the maximum fees which may be charged for services performed *in connection with* any claim before the Secretary under this title . . .," Social Security Act § 206(a) (emphasis supplied), to relate solely to fees set by courts.

[328] *See* note 293 *supra.*

[329] The decisions drawing the line between services before the Administration

certainty of their regulation effectively limit the availability of legal services,[330] the Social Security Administration makes it clear that a claimant should look first to it for assistance in appealing the rejection of an application or denial of an administrative appeal. "A person requesting a hearing . . . may be represented by counsel or by any other person he

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and services before the court, *see* note 203 *supra,* are not well supported. The opinion in Robinson v. Gardner, 374 F.2d 949 (4th Cir. 1967), the first decision in the Fourth Circuit to rely on the separation to require an attorney to apply independently to the Administration for compensation for work before it, cites Chernock v. Gardner, 360 F.2d 257 (3d Cir. 1966), for the proposition that the Administration's power of fee determination for representation before it is *"exclusive." Id.* at 951. Chernock, however, holds that the power is *conclusive, i.e.,* that the exercise of it is not subject to judicial review. Because attorney Chernock had not represented a claimant before any court in the proceeding for which he sought compensation exceeding the Administration's allowance, the issue of the concurrent power of the court to set a single fee for all services in a proceeding ending in a judgment granting benefits was not before the court. Chief Judge Aldrich, establishing the separation for the First Circuit in Gardner v. Menendez, 373 F.2d 488 (1st Cir. 1967), states the opinion that § 206(b) codifies the court's inherent power to award a fee, citing Sparks v. Celebrezze, 342 F.2d 286 (5th Cir. 1965). Neither Sparks nor other social security cases in which a court has either set a fee or declined to rule against the fee agreed upon between claimant and counsel, *see* cases cited in note 284 *supra,* have distinguished between compensation for work before the court and antecedent work before the Administration. It seems clear that the contingent fee involved was compensation for all services in the proceeding. Hence the decision in Menendez and in the other cases upholding the division interprets § 206(b) to *restrict* the scope of the inherent power of the court to determine fees. Although a literal reading of § 206(b) suggests strongly that it speaks only to compensation for services for representation before the court, the section is couched in the permissive or discretionary term "may," its literal meaning is on other questions anything but unambiguous, and there is no indication that Congress intended to restrict judicial authority to set fees except to impose a 25% maximum.

Conversely, the power of the Administration to award fees for legal services before a court has not been clear under the language of § 206(a). Its authority extends to "services performed *in connection with* any claim before the Administration" (emphasis supplied). In a criminal proceeding under the portion of § 206(a), making it a misdemeanor to violate the Administration's fee regulations, services in amending back tax returns to qualify a claimant for benefits were assumed to be "in connection with" the claim for benefits itself. United States v. Lewis, 235 F. Supp. 220 (E.D. Tenn. 1964). If anything is "in connection with" a claim before the Administration it should be the same claim before a court. *See* notes 218, 280 *supra.*

The two sentences added to § 206(a) by the 1967 Social Security Amendments on their face overrule the decision in Chernock, *see* text corresponding to notes 216, 217 *supra,* and *require* the Administration to "fix . . . a reasonable fee to compensate such attorney for the services performed by him *in connection with* such claim" before the Administration (emphasis supplied). Thus the way is paved for the decision-maker finally directing the payment of benefits to allow a single attorney's fee for all services rendered in the claims proceeding.

[330] Between January 1966 and July 1967 claimants were represented by at-

wants to have represent him; however, it is not necessary that he be represented."[331] The attitude of grudging admission toward representation and the implicit suggestion that it is a complication, ornament, and expense that a claimant need not incur permeate the written statements of the Administration on the subject[332] and, presumably, the oral advice of Claims Representatives, Hearing Examiners, and other personnel as well. Although there seems to be within the working policy of the Administration a perceptive sensitivity to the incapacitated confused, and otherwise incompetent claimant, its formal rules, communications, and announcements do not and perhaps cannot distinguish between the run-of-the-mill case, in which the services of any representative would be more burden than help, and the unusual but not rare case in which the claimant's eligibility is not at the outset clearly established or not establishable.

The courts have not successfully clarified the right of a social security claimant to representation at the hearing at which the record is made upon which the decision in his case must be based. In rejecting a categorical statutory or constitutional requirement of representation in

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torneys in about 19 percent of the cases decided by Hearing Examiners. *See* note 332 *infra.*

[331] HANDBOOK § 2009, at 331. Unlike an attorney, a non-lawyer representative must file a notice of appointment which indicates that he "is of good character, in good repute, and has the necessary qualifications to enable him to render valuable assistance to the individual in connection with his claim." 20 C.F.R. §§ 404.971, 404.972(b), *as revised,* 32 Fed. Reg. 7750-7751 (1967). "However, a member of a firm, labor union, or other organization may act as representative of a claimant if he does so as an individual and not in his capacity as an agent or employee of the organization or firm." HANDBOOK § 2014, at 332-33. From January 1966 through June 1967 non-attorney representatives appeared for claimants in about 8 percent of the cases decided by Hearing Examiners.

[332] The back of the "Notice of Hearing" form, HA-507 (Apr. 1964), states under "Important Information" the following information, as informally marked up to accord with 20 C.F.R. § 404.975, *as revised,* 32 Fed. Reg. 7751 (1967), removing the minimum fees which a lawyer formerly could charge and collect without approval of the Administration or Hearing Examiner: "*Representation.* While it is not required, you may be represented at the hearing by a lawyer or other qualified person of your choice, if you desire assistance in presenting your case. . . . If you have a representative you are responsible for paying his fee. The Hearing Examiner's authorization is required if the lawyer wishes to charge a fee, or a non-lawyer wishes to charge any fee." Although an early social security case found no requirement that a claimant be informed by the Hearing Examiner of his right to retain the services of counsel, Ussi v. Folsom, 254 F.2d 842, 843 (2d Cir. 1958), the statement on the Hearing Notice has been held to be adequate notification of the right to representation at the hearing. "The recurrence of legal terminology throughout the Notice would tend to challenge the comprehension of a layman. Plaintiff was not prevented from availing himself of counsel. The choice to be without counsel was his own." Meola v. Ribicoff, 207 F. Supp. 658 (S.D.N.Y. 1962).

every case, akin to the right to counsel in major criminal proceedings, the courts consistently have refused to rule that the stages of decision-making in social security claims determination are comparable to criminal trials or that the rights of social security claimants are equivalent to the rights of the accused. However, in exercising discretion to remand cases for further evidentiary development because of errors in the decision-making of the Hearing Examiner or Appeals Council, they have frequently recognized, either implicitly or in passing,[333] that a reason for the inadequacy of the record and consequently for the remand was the absence of counsel for the claimant during its construction.

The core of the difficulty in setting a definite and simple standard for representation lies in the Three Hat duties of the Hearing Examiner. A number of courts have held that the hearing is not adversarial[334] and that therefore the claimant should not be penalized for failing to meet his burden of proof.[335] He does not have a right to the relief of reversal and remand merely because he was not represented by counsel but solely because the Hearing Examiner did not adequately serve his interests during the hearing.[336]

> The hearing examiner . . . has a greater duty to attempt to adduce testimonial evidence from the plaintiff and his witnesses which would reveal all the facts whether in support of his claim or against it when a claimant is not represented by counsel.[337]

The practical standard that emerges from this analysis of the position of the claimant at hearing is that remand is in order if, and only if, examination of the record shows that the Examiner under his Three Hats failed to produce and collect all relevant and material evidence. If the court fails to find any insufficiency in the record and counsel for the claimant cannot show good cause for opening it, *e.g.*, additional relevant and material evidence, remand is not in order[338] and, implicitly, the claimant has not been denied any right to counsel, either by absence of a private lawyer or by dereliction of the Hearing Examiner.

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[333] *See, e.g.*, Ross v. Gardner, 365 F.2d 554, 556 (6th Cir. 1966); Hall v. Celebrezze, 217 F. Supp. 905, 905-06 (M.D.N.C. 1963).

[334] *See, e.g.*, Hodges v. Celebrezze, 232 F. Supp. 419 (W.D. Ark. 1964); Ihnen v. Celebrezze, 223 F. Supp. 157 (D.S.D. 1963); Butler v. Folsom, 167 F. Supp. 684 (W.D. Ark. 1958).

[335] *See, e.g.*, Crowder v. Gardner, 249 F. Supp. 678 (D.S.C. 1966); Hodges v. Celebrezze, 232 F. Supp. 419 (W.D. Ark. 1964).

[336] *See, e.g.*, Ihnen v. Celebrezze, 223 F. Supp. 157 (D.S.D. 1963); Wray v. Folsom, 166 F. Supp. 390 (W.D. Ark. 1958).

[337] Hodges v. Celebrezze, 232 F. Supp. 419 (W.D. Ark. 1964).

[338] *See, e.g.*, Butler v. Folsom, 167 F. Supp. 164 (W.D. Ark. 1958).

There are two inadequacies in this standard. First, it overlooks the adversarial nature of the hearing.[339] Second, it fails to take into account the procedural hurdles which may have been placed in the way of the uncounseled claimant.[340] Many of the decisions in disability cases reversing and remanding for error in the Examiner's process of decision-making do of course implicitly recognize or encourage the adversary contest of the hearing and the failure of the Examiner properly to represent the claimant. The fact that the claimant is represented by counsel before the court and will be represented at the remand hearing obviates the necessity of separately deciding the issue of relief for inadequate representation before counsel entered the case. However, there may be actions on judicial review in which the record is held to be adequate to support the Hearing Examiner's decision with substantial evidence and his decision is held to have been reached with requisite rationality. Nevertheless, because of lack of counsel, the claimant's case was not adequately presented to the Examiner, and the Examiner did not or could not make the presentation himself to himself. The standard for determining whether the case must as a consequence be remanded should involve not only considering whether evidence may have escaped from inclusion in the record but also whether the claimant, because of any kind of incapacity in understanding, articulateness, anxiety, or forensic skills was not adequately represented by the Examiner under his Three Hats.[341] This standard thus requires the court to search the record to determine not only the evidence, but also the advocacy for the claimant.

> It is apparent that Mrs. Carter's case has been improperly presented. By her attitude and the statements made by her, the impression could easily have been given that plaintiff had made

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339 *See* text corresponding to notes 194-97 *supra.*

340 *See* text corresponding to notes 247-78 *supra.* For an egregious example of hurdle-tripping and a court's summary rebuff of a *per se* attempt to return to the race, *see* Small v. Gardner, 390 F.2d 186 (1st Cir. 1968).

341 A similar standard has been applied to remand a case for inadequate representation by the claimant's legal counsel. "Appellee was represented at the Examiner's hearing by an attorney, but the record discloses that the attorney took no part in the examination of witnesses, offered no testimony on appellee's behalf and gave the appellee no apparent legal assistance in the preparation of the case, admitting on the record that he knew very little about Social Security laws. . . . We have carefully reviewed the evidence before the Examiner and find that there is substantial evidence in the record before us to support the findings of the Secretary adverse to appellee's claim of 'disability' . . . [but] claimant did not have the proper representation to which he was entitled. . . . Under these circumstances claimant cannot be held to have had the full hearing that he was entitled to. Accordingly,

> up her mind not to work any more and to try and secure her Social Security disability benefit payments.
>
> Had plaintiff been represented by counsel before the Hearing Examiner the result may have been different. On proper cross-examination the testimony of Dr. Brown, the Vocational Consultant, may have been more favorable to plaintiff's cause.
>
> This court feels that this is a borderline case and that the ends of justice would best be met by allowing plaintiff the opportunity of a new hearing where she may be properly represented by counsel. . . .[342]

In reaching its decision the court should resolve in the claimant's favor all doubts about the fairness of the treatment of his suit in the prior hearing process. It should not indulge any presumption that impartiality has triumphed over adversariness, as the court did in the leading case of *Nichols v. Celebrezze:*

> Under the due process clause of the Fourteenth Amendment to the Constitution, plaintiff was entitled to a full and fair hearing at some stage of the proceedings. It appears clear to the Court after having examined the transcript of the hearing before the

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. . . the case is remanded. . . ." Arms v. Gardner, 353 F.2d 197 (6th Cir. 1965). *Cf.* Brown v. Gardner, 249 F. Supp. 968 (N.D. Ala. 1965). "While the Appeals Council was correct in its insistence that plaintiff submit to additional medical tests, it appears that plaintiff's refusal to do so was based on advice of counsel. . . . [T]aking into consideration all of the circumstances involved here, it would seem more equitable for this court to remand the case to the Secretary with instructions that plaintiff be given an opportunity to submit to such additional medical evaluation and examination as the Secretary may direct." *Id.* at 969-70.

An analogous standard should be applied when, in the absence of private counsel, the claimant's representation depends on himself and the Hearing Examiner. However, the relevance of *Arms, supra,* has been rejected in such a situation. *See* note 349 *infra.*

[342] Carter v. Celebrezze, UNEMP. INS. REP. ¶ 14,043 at 1993-94 (N.D. Ala. 1965). "[I]n administrative proceedings in which rights and privileges are in issue and the guiding hand of counsel is not present to advocate their existence, a duty devolves on the hearing examiner to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts surrounding the alleged claim of right or privilege. The hearing examiner is entrusted with a broad discretion in the conduct of the administrative hearing and a failure of the hearing to produce a full airing of the facts in issue may well be attributed to an abuse of that discretion. . . . In the instant case, Mrs. Hennig is seen to be a middle-aged woman with a ninth grade education. . . . The record amply reflects her inability to present both herself and her cause. . . . Mrs. Hennig should have been questioned more thoroughly by the examiner. . . . For these reasons the failure of the examiner to adequately explore the facts surrounding Mrs. Hennig's claim was an abuse of his discretion. The examiner, although an employee of the federal government, does not hold a position of partisanship. If the facts which would entitle the claimant to relief are ascertainable, the examiner has a duty to seek them out, notwithstanding the claimant's failure on his own initiative to do so; the interests of justice so require." Hennig v. Gardner, 276 F. Supp. 622, 624-25 (N.D. Tex. 1967).

> Hearing Examiner that plaintiff's interests would have been better protected if he had been represented by an attorney inasmuch as a claimant under the Act has the burden of proving he is entitled to benefits. However, the Court cannot say that the hearing before the Hearing Examiner was so void of fairness that it violated constitutional due process requirements. In addition, it is shown in the record that Mr. Paul James, an attorney and a qualified member of the bar of this Court was engaged by Nichols sometime after the Hearing Examiner's decision was rendered. Nichols, by his attorney, appealed to the Appeals Council and filed with that agency additional evidence and a brief wherein he raised the issue of lack of counsel in the hearing before the Hearing Examiner. Although the Appeals Council declined to formally review the Hearing Examiner's decision, this Court presumes that they did so only after a full and fair examination of the record, plaintiff's brief, and the additional evidence plaintiff submitted to them.[343]

Second, the standard of representation should be especially sensitive to possible denial of procedural due process through lack of counsel. It has been urged earlier in this article that courts should review under the authority of the Administrative Procedure Act administrative rejections of requests for reopenings and time extensions and administrative applications of *res judicata*.[344] It is urged here that applying the standard for reversing the denial-arbitrariness and unreasonableness in the decision—should include weighing the effect of lack of counsel at any point along the claimant's procedural way. Denials by the Administration of the attempts of unlettered and unaided claimants to prosecute their claims after final and binding decisions against them should be held to close scrutiny:

> [T]his Court is reluctant to approve the use of a technical defense such as res judicata to bar a semiliterate, uncounseled claimant from benefits to which she may well be entitled, particularly where the prior proceedings relied upon as a bar were perfunctory administrative proceedings of a nonadversary nature and where the very notice of denial could well suggest to a person such as the claimant that the denial was not final. Such a defense is peculiarly inappropriate where the Secretary's duty in administering the statute is to see that those who are entitled to benefits under the statute receive them.[345]

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[343] 243 F. Supp. 921, 925 (S.D. Iowa 1965). *See also* Ussi v. Folsom, 254 F. Supp. 842, 844 (2d Cir. 1950).

[344] See text corresponding to notes 272-78 *supra*.

[345] Staskel v. Gardner, 274 F. Supp. 861, 865 (E.D. Pa. 1967) (court's footnotes omitted). *Cf.* Craig v. Secretary, 1A UNEMP. INS. REP. ¶ 14,918 (W.D. La. 1967).

The standard of representation or the right to representation is not a matter of strictly enforcing an overriding constitutional guarantee or narrowly adhering to the confinement of a statutory prescription. The twin goals of procedure in social security cases are practicality and fairness. They are most fully achieved by regarding the reality of the hearing process, not the proclamations of the bureaucrat or the legalist. Weighing fairness with practicality is not an easy task. It has been said that the fairness of administrative hearings in social security cases would be greatly improved, and the difficult position of the conscientious Hearing Examiner greatly relieved, if both the claimant and the Administration were represented by counsel. Whether on comprehensive, thorough and independent review of the hearing process this conclusion would be advised—especially at the cost of part of the claimant's benefit in every successful case—is a waiting question.[346] Its practicality is remote so long as lawyers dimly perceive the economic sense of taking social security cases; so long as compensation depends on a *quantum meruit,* contingent fee lawyers will tend to take only the cases believed most promising to win.

Therefore, the standard of representation must be flexible, but the flexibility must not be equated with indefinability or mistaken for nonexistence. The absence of a clearly-established standard of representation falls on the claimant who does not understand the machinery of appeal and cannot take up the burden of his case. The common example is the disability claimant whose application for benefits is turned down, who does not respond until after the decision has become final and binding, who loses his disability insured status through failure to work and passage of time, and who perhaps after a number of subsequent applications, each rejected on *res judicata* grounds, finally obtains the interest and services of an attorney.[347] Judicial refusal to review administrative denials of attempts to overcome the finality of prior decisions prevents him from gaining any review of the administrative actions, and his counsel's desperate resort to ingenious arguments does not avail.

Yianatos v. Celebrezze[348] is such a case. The court refused to overturn the Administration's denial of time extension and application of *res judicata.* With extensive analysis it denied the contentions of counsel

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[346] It is possible of course to take the step of assigning counsel at government expense for the representation of all indigent social security claimants. The step seems impractical and, inasmuch as it would substantially alter the current structure of the administrative hearing, inadvisable until substantial study has been completed that shows its need.

[347] *Cf.* note 130 *supra.*

[348] UNEMP. INS. REP. ¶ 14,413 (D.S.C. 1966).

that (1) claimant was so disabled by his illiteracy as to toll the statute of limitations for appealing his case into court; (2) the government owes social security claimants legal representation as "caretaker" (analogizing to provision of criminal counsel); and (3) the claimant's prior counsel—himself—was so inadequate as to deny him a fair hearing.[349] In disposing of the second argument, the court exclaimed:

> Alas for the prayer for justice, the examiner has been . . . persecutor, prosecutor, judge, jury and adversary to the pleading laborer. The courts have corrected, decreed, suggested, but ears are deaf. The United States is not the caretaker. Many would find happiness in simple justice if such were the case.[350]

IV. Recapitulation

Social Security is the largest, broadest, and most firmly established social welfare program in the United States. Although it is for, by, and of the middle class, its largesse spills over to poor people quantities of financial assistance that make it the giant among poverty programs. It is increasingly realized—and criticized—that social security is not, and never has been, public "insurance" of secure but limited rights, that it is a pay-as-we-go system for transfering income from the working to the non-working which, like the chain letter, seems to require more pay the more it goes; and that, financed by a severely regressive tax, it barely overrules the adage that it is the poor that help the poor.

The Social Security Administration that runs the social security program is itself large, multi-branched, and well entrenched. As a monolithic bureaucracy it has scrupuously guarded its operations from comprehensive, independent scrutiny even in a time when other welfare bureaucracies are battered with the unleashed attack of pent-up frustration and unrequited patience. The Administration is not, however, the villain of this piece. It serves well the middle class and most of the poor. It has very considerably converted welfare benefits from largess-in-theory into rights-in-action. In this light it is a model which all welfare agencies should copy.

The social security bureaucracy is not likely to wither away, notwithstanding the nation's adoption of a comprehensive guaranteed income or family allowance plan. As the model agency for determining

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[349] Plaintiff relied upon Arms v. Gardner, 353 F.2d 197 (6th Cir. 1965), to support this contention, but the court responded that "the facts in that case are far afield from the setting here. Here the issue is procedural." *Id. But see* note 341 *supra.*

[350] *Id.*

eligibility for cash grants, it should not wither away. Moreover, because it is based on the twin values of productive work and family responsibility the social security program itself commands a base of public support that no other welfare program, existing or proposed, could currently enjoy.

However, because it is a bureaucracy the Social Security Administration tends to discriminate against the poor who do not lead the orderly, uncomplicated, predictable, and secure lives of the middle class. The discrimination has been most evident and pervasive among the Ed Sizemores of Appalachia, the former coal miners and other laborers whose industry has given out and whose economic lives are spent. The discrimination extends to others who cannot get work because, usually among other reasons, they have suffered crucial reductions in their capacities to obtain and retain jobs. To the petitions of these men and women for disability benefits "earned" by social security taxes paid in the past, the Administration has responded with objective tests of medical impairment and abstract findings of residual ability for gainful activity. It has denied many their claims and imposed a labyrinth for appeal.

A sizeable number of claims have run the labyrinth and emerged in federal court for review, where a large proportion of administrative denials of benefits have been reversed, immediately by judgment or ultimately on remand. The courts have examined with their own perspectives the Administration's purposes and standards for the disability program. They have rejected the objective tests and abstract findings to establish their own overriding criterion: can this claimant, who has established medical impairments, find and keep with reasonable diligence some kind of full-time employment?

It has been the purpose of this discursive article to present to lawyers and law students a description of the process of adjudicating claims for social security benefits. It has been the purpose to expose the differences between the Administration's bureaucratic, procedure-oriented conception and the courts'—the lawyers'—existential, purposive approach. It has been the purpose most importantly to urge lawyers to exert upon the bureaucracy, from within or without, legal standards of rational, wholistic decision-making that would improve the social security program as an adequate, comprehensive, and responsive means of income maintenance.

There is something wrong with a process for deciding individual claims for welfare benefits that for many cases contains six stages of determination and takes half as many, or more, years to get through. That claims for disability benefits should be routinely passed upon by federal courts because judicial precedents are not followed at earlier

stages is a wrong that can properly be righted by legislative overruling of the court decisions. The wrong is scarcely righted, however, by a legislative change that uncritically sanctions the pursuit of bureaucratic ideals in conflict with the goals of income security.

It would be facetious and presumptious to make explicit recommendations for change on the basis of the brief review in this article. Two suggestions, in addition to the specific recommendations elsewhere in the text, are enough. First, the stages of claims adjudication should be reduced, at least the number in which the claimant's initiative is required. Except for appellate judicial review in novel cases, three stages—application, hearing, and court review—should suffice. The ways for restarting claims that have incurred final and binding decisions should be simplified and liberalized. Structuring formal adversariness into the hearing stage should not be regarded as the necessary answer to the Three Hat problems of Hearing Examiners, especially if it promises ultimately to replace bureaucrats' technicalisms with lawyers' technicalities.[351]

Second, the lawyers' refashioning of the standards of disability should be seriously studied for the wisdom of the benefit expansion that they entail and the feasibility of adhering to them within the bureaucratic process. The artificiality of procedural distinctions among determinations of medical impairments, residual work capacity, and accessibility to jobs should not work to the claimant's disadvantage. Under the current definition of disability the assessment of age, education, and work experience must bridge the gap between the findings of physical and mental impairment and ability to engage in gainful employment. The results of state agencies extending vocational rehabilitation services to claimants should be much more closely related with the process of adjudicating claims for benefit entitlement so that, by integrated decision-making, the claimant who establishes his reasonable willingness to work is either rehabilitated or awarded benefits.

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[351] *Compare* social security procedures for resolving benefit claims *with* parallel public assistance fair hearing requirements. Although there are substantial differences between the two Social Securtiy Act programs, *see, e.g.*, notes 49-53 *supra* and text corresponding thereto, and although the public assistance hearing and other claims determination processes are in several substantial ways less adequate than social security program provisions, *e.g.*, qualifications and independence of hearing offices and right of court review, the public assistance requirements afford the claimant some clearly-specified rights and advantages not found in social security practices. Moreover, the trend in public assistance fair hearing requirements, represented by changes in federal regulations, promulgated by the Social and Rehabilitation Service of the Department of Health, Education and Welfare, Social Security Act § 1102, 4211 U.S.C. § 1302 principally of the continual litigation and other activity on cliamants' behalf to improve the fairness of the processes, see Welfare Law Bulletin *passim*, shows both a speed and a claimant concern not found in any social security program developments. *See, e.g.*, SOCIAL AND REHABILITATIVE SERVICE, FEDERAL

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, §§ 6200(b) (right to hearing because "claim for assistance is . . . not acted upon with reasonable promptness"), 6200(c) (requirements that "all fair hearing decisions will be accessible to the claimants, their representatives, and the public"), 6200(h) ("when the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer or the appellant considers it necessary."), 6200(j) ("Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing."), 6300(b) ("A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority."), 6300(m) ("When an assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant, it is obtained, at agency expense, from a medical source satisfactory to the claimant."), 6300(o) ("Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case record, or other material prior to the hearing unless such material is made available to the claimant or his representative."), 6400(a) ("Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated . . . [W]ritten, and whenever practical, oral information of the reasons for change, denial, or termination . . . is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on non-debatable facts."), 6400(a) ("In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payments for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the skill and knowledge of the legal profession in these matters.).

STATE BAR SECTION

NATURALIZATION AND LAW DAY SPEECH, FEDERAL COURT, VICKSBURG, MAY 1, 1968

Fred B. Smith

A number of years ago, in a little talk, I made the statement that three things are absolutely necessary for the long survival of the human race—bread, health and hope. Today, as I consider the significance of this occasion, I am impelled to add a fourth essential to the orderly continuance of mankind; that is, home. The highest and noblest efforts revealed in all the annals of history have been those put forth in behalf of man's homeland, whether native or adopted.

Home is a precious possession, but sometimes under the fell chance of circumstance, it becomes necessary that men and women abandon their native land and seek and establish their dwelling place on some other shore. It must be a heart-rending experience to break the ties of family and friends and familiar associations, and go into a completely new and strange environment. It is bound to present puzzling problems and perplexing situations. But there are innumerable illustrations which prove that over and over again, adopted citizens have found for themselves eminent places in the business, professional and political world of their new land, and in the hearts of new friends.

For many years Mrs. Smith and I have found great pleasure in travelling among peoples of other countries. On numerous trips we have enjoyed the hospitality of other lands. In all, we have spent time in approximately fifty different foreign countries of the world. I am sure there are many of you here today whose native land we have visited. Your people have welcomed and been hospitable and kind to us, and today it gives us great pleasure, in return, to welcome you as citizens of the United States of America.

All of us here today are wanderers to this great land, only a few generations removed. Those of us who can trace our American lineage back the furtherest find that six or seven generations ago our forefathers came here from the older countries, just as you have come. They came largely for the same purpose, to find homes and freedom and independence and equality of opportunity. And despite the tremendous difficulties facing our region today, I verily believe that nowhere else on earth can you find those precious possessions more readily available and more

surely guaranteed, than here.

When our ancestors originally came they found a wild, bleak and hostile land. They had virtually no outside support, and nothing to sustain them except their own unconquerable and indomitable courage and determination. Difficulties did not sway them; hardships did not discourage them; obstacles did not check them. Suffering, misfortune and adversity only gave them greater determination to build a nation. Overcoming almost insurmountable barriers, they built this nation. And this morning, as you become a part of the nation they struggled so courageously to construct, one of your prime and paramount goals should be to help always preserve the dream on which they brought it into being.

May I take the liberty of saying to you that in becoming American citizens, you should have certain definite objectives. First, the objective of finding and founding here a real and actual home, one in which you can take pride, and in which you may find happiness and contentment.

After all what is a home? It is not merely a location, a community, a city, an apartment or a house. Lord Byron once said: "Home is where the heart is."

Our own Edgar Guest said:

"It takes a heap of living in a house to make it home."

Home, a real home, is where there is love and faith and hope and trust and cooperation. Where the days and weeks and years may pass swiftly by, and we can look back and call them good. Where we find a haven of satisfaction and comfort and enjoyment, and escape for a time, from the trials and tribulations of everyday life. Yes, your first effort should be toward founding here a real and permanent home.

Two weeks ago we had the privilege of hearing the Baroness Maria Von Trapp, whose life history formed the basis of the great motion picture "The Sound of Music," make a speech in which she described her own experiences—the destitution and hardships, the suffering and adversity she and her family encountered after being driven out of their native Austria, as they went from country to country, until they finally came to America. Their soul-searching emotions in trying to determine their own destiny, and finally their happiness and satisfaction in founding their New England home as American citizens. It was an inspiration, even to us, who have always had this land for our home.

Another objective which should inspire you as you leave this courtroom today is that of being true, genuine, sincere and patriotic citizens of your new nation . . . citizens willing to give of your best effort toward promoting the welfare of these United States. A few days ago I saw a

placard on a wall with the words of President Kennedy which defined the type of citizen most needed by this country today, it said:

> And so, my fellow Americans: Ask not what your country can do for you—ask what you can do for your country. (INAUGURAL ADDRESS. January 20, 1961 as reported in *Public Papers of the Presidents of the United States*, John F. Kennedy, page 1 (1961).)

No nation can long survive whose citizens are not willing to place the national good above the selfish wishes of the individual. This land which is ours today did not have an easy origin or birth. In the beginning it took toil and application and limitless effort to convert and transform a vast and boundless area of wilderness and plain and desert and mountains, into a prosperous, producing and civilized country, and our attitude in this age in which we live, shall determine whether it shall remain as a blessing to your children and mine.

You are entering into American citizenship in trying and troublesome times. The terrific problems which face this nation today may make some of you wonder as to the wisdom of your choice. But dangerous days and alarming situations are not new to America, we have faced them many times before. Her history is the story of the mastering and overcoming of difficult crises. Ours is a powerful and wealthy nation; a nation of great cities, fertile lands, vast forests and tremendous industries, but her accomplishments in the past, her hope in the future, lie not so much in these material resources, as in the courage and steadfast faith of those who are loyal and genuinely patriotic citizens of this land.

America shall survive. She shall overcome the dangers and difficulties which are ours today, because she is a nation founded and built and anchored on the principle of law and justice and right. This, the First day of May, is Law Day throughout this land, and may we now for a few minutes direct our thoughts to the law and its meaning in American life.

In the primitive period of man's history, his social, business and political relationships were comparatively simple and unsophisticated, and his dealings and communications, one with another, were largely controlled by the laws of nature. However, with the passage of time, his experience proved that a more elaborate system of rules and regulations, for the control of conduct, action and behavior, was absolutely essential. Out of this necessity there gradually grew various binding guides of action. There developed the realization that certain fundamental mutual obligations are binding upon persons dealing with each other. As a result of all this there came into being, in various parts of the world, the

science of human relations which we call "law."

Along with the regulation of human actions and relationships there, of necessity, developed systems of government and the vesting of power and authority in certain individuals. One generation built its laws upon the experience of the preceding generation. We are indebted for our fundamental system of law, to a large degree, to the ancient Israelites, the Greeks, the Romans, the Anglo-Saxons and the Normans.

As legal systems of government grew, those placed in control appropriated to themselves more and more power and authority. There developed an asserted "Divine Right" of the ruling classes over the masses of people. Succeeding centuries saw the overwhelming majority of human beings sink lower and lower into serfdom, slavery, suffering and despair. Despotic rulers and their satellites treated human beings as no more than beasts of burden. Law became the tool of the oppressor, and the burden and impediment of the oppressed. But suffering people dreamed of freedom, and toward its realization, they slowly and painfully struggled for hundreds of years. The first great step in that direction was the securing of a document which, in reality, to a large extent, is the foundation stone of our own constitutional government. That document, the Magna Charta, was the supreme accomplishment which toiling, struggling, suffering generations had at last secured as a stepping stone on which humanity might escape a portion of its misery and wretchedness.

Many years later, in a comparatively new land, our own forefathers presented to the world one of the greatest pronouncements of all the ages. Embodied in the provisions of the Declaration of Independence was found a new home for mankind. Among those truths found and declared to be self-evident was the fact that all men are created equal; that they are endowed by their Creator with the inalienable rights of life, liberty and the pursuit of happiness. That great document was shortly followed by the Constitution of the United States, and in the realm of the liberty of mankind, it, also, is one of the crowning achievements of the human race. It contained the enunciation of the supreme rights of the individual. The right of security in their persons, houses, papers and effects; the right of the preservation of life, liberty and property; the right to the freedom of speech, of the press and of religion, and the protection afforded by due process of law.

The fundamental law of our nation today is largely an outgrowth of the evolution of the Constitution, as found in its interpretation by the courts of the land. There are those who criticize and find fault with the expanding construction placed on many of its provisions by the courts. I must confess that many times I find those holdings contrary to the traditions which I have loved and cherished. But we must realize

that in order to undergird the advanced civilization of this day, our Constitution could not be held to the limitation of the political, social and economic horizons of 1787. It must be considered as a flexible document, with sufficient elasticity to incorporate in its expanding bounds, problems wholly unknown to its writers. Chief Justice Marshall realized this in the early years of the Republic when, in the case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1918), he referred to the Constitution as follows:

> [A] constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

As our way of life has changed in the past hundred years, as our civilization has become more complex, as new and novel conditions have presented themselves, whether we like it or not, it became necessary that the legal concept be altered to meet the exigency of modern society. The courts have been required to interpret the fundamental laws of the land as they apply to wholly new and different situations, to those existing a generation ago. Mr. Justice Frankfurter, in *Wolf v. Colorado*, 338 U.S. 25, 93 L.Ed. 1782, 69 S. Ct. 1359 (1949) said:

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined with a permanent catalog of what may, at a given time, be deemed the limits of the essentials of fundamental rights.

Our greatest national heritage is the ideal of liberty and freedom on which the nation was founded. The courts of the land have frequently proclaimed the width and breadth of those constitutionally guaranteed rights. Mr. Justice McReynolds, in *Meyer v. Nebraska*, 262 U.S. 390, said:

> While this court has not attempted to define with exactness, the liberty thus guaranteed [(by the Constitution),] . . . Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

In the case of *Grosjean v. American Press Company*, 297 U.S. 233,

Mr. Justice Sutherland said:

> The word 'liberty' contained in the amendment, embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all of his faculties as well.

In the 181 years since 1787, the people of America have only seen fit on 22 occasions to change the Constitution by way of amendment. Those amendments have strengthened, rather than weakened, the original image of liberty and freedom which were its primary keynotes. However, modern construction and interpretation, to meet constantly changing and varying problems and conditions, have done more towards enlarging and expanding the meaning, import and significance of the Constitution, than the amendments adopted through legislative processes. This has caused many thinking people to feel that the pendulum is beginning to swing too far in the direction of the protection of unrestrained activities under the guise of the rights of liberty and freedom of action.

Shortly after our own American Revolution, the French Revolution went forward under the rallying-cry of "liberty, equality and fraternity." In the midst of the excesses which were practiced before the French Republic was finally formed and order restored, as Madame Rowland was led to the guillotine, she cried:

"Oh, liberty, what crimes are committed in thy name."

America must guard well against such a cry being justified in our own land. Liberty must remain and be everlastingly preserved, but it must not become the shield of the law violator, of the looter, the robber, the murderer, or the lawless demonstrator. The law must retain its respect. It must maintain the rights of the majority as well as those of the minority. Another great law writer visioned the dangers which might come from carrying individual liberties too far, and Mr. Justice Stone, in *Virginia Railway v. System Federation*, 57 U.S. 592 (1937), said:

"The Fifth and Fourteenth Amendments are not a guarantee of untrammeled freedom of action."

We must not lose sight of the fact that the law must justly control and restrain, as well as emancipate and liberate. An unrestrained people is a dangerous and destructive people. There is a dangerous trend in America today which is barely short of anarchy. This trend was inaugurated and is encouraged by those who advance the idea that a law which

they do not like, and which they think is contrary to their fundamental rights, may be ignored and disobeyed at will; that court injunctions with which they disagree may be disregarded. Such a perilous attitude must not be permitted in this nation. No form of government is perfect, but the best system yet devised by man, down through the ages, is the democratic method of rule. And one thing that is absolutely essential to the preservation of the democratic system of government is that if a law is wrong, if it is believed to produce improper conditions and results, it must be abolished by orderly legislative or judicial process, and not by the arbitrary and unlawful acts of a group.

In the troublous days confronting us, the lawyers of this nation have a tremendous responsibility. A higher degree of consideration and respect of the weight and significance of the law, and its importance to American life, needs to be inculcated into the hearts and minds of our citizens. The lawyers of America are in the best position to assist in bringing that about. Ours is an honored and respected profession—we come in contact with people from all walks of life—we have the opportunity of molding sentiment and influencing opinions—no group has a better chance of shaping the drift and trend of public opinion and civic affairs, than the American Bar.

The law is not static—It is not an exact science, but is a constantly growing and developing one. The methods of the practice of law, especially in the courts, are wholly and completely different from those in vogue when I was admitted to the bar a half century ago. Therefore, the lawyers of America are constantly confronted by an unlimited frontier. The manner in which our profession meets the challenge in a changing world, may largely determine the future of the country.

We must realize that the law is the final great bulwark of every free people—destroy, if you will, the most valued and highly prized material ramparts of our nation, but leave to us, unfettered and untrammeled courts, and a law based upon justice and equity and right—a law which our people respect and obey, and America will survive any situation which may ever arise.

STUDENT COMMENTS

VICTIMS OF VIOLENT CRIME: SHOULD THEY BE AN OBJECT OF SOCIAL EFFECTION?*

In the past few years a number of jurisdictions have enacted legislation providing state compensation for victims of violent crimes.[1] The idea of victim compensation has gained general widespread favor, and there is evidence that more of these compensation plans are on the planning boards.[2] Because humanitarian instincts are easily aroused by the plight of the hapless victim, there is a tendency to seek legislative remedies for these misfortunates without proper academic reflection. The purpose of this paper is to present the various rationales of victim compensation, to examine the implemented and proposed compensation schemes, and finally to consider the truly vital issue of victim compensation—is there a need for such a program.

Concern for the welfare of victims of crime lay dormant after the advent of modern criminal law.[3] A little more than a decade ago, however, the crusading of the English social reformer, Miss Margery Fry[4] aroused with a new vigor the interest in these unfortunate members of our society. Seemingly shocked that such an obvious object of social

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* Due to a publication backlog, this article was not published immediately after it was written. Since its completion, two states have enacted compensation plans similar to those discussed in detail here. They may be found as follows: MD. ANN. CODE, art. 26A, §§ 1-17 (Supp. 1968); MASS. ANN. LAWS, ch. 258A, §§ 1-7 (1968).

[1] PUB. L. No. 134 of 1963 (N.Z.); *cited in* Cameron, *Compensation for Victims of Crime: The New Zealand Experiment*, 12 J. PUB. L. 367. CAL. PENAL CODE §§ 13600-13603 (West Supp. 1967); N.Y. EXEC. LAW §§ 620-35 (McKinney Supp. 1966); HAWAII ACT 226 (1966).

[2] S. 2155, 89th Cong., 1st Sess. (1965) (Amended 2d Sess. (1966)); Illinois (H.B. 682-3, 1967); Maryland (S.B. 151, Feb. 4, 1966); Massachusetts (Res. 29-1, 1966); Oregon (H.B. 1822, March 4, 1965); Wisconsin (S.B. 450, April, 1965).

[3] Rare exceptions were the Italian positivists, particularly Garfalo and Ferri. Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444, 448-50 (1964) [hereinafter cited as Childres]; *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191, 239-41 (1959) [Hereinafter cited as *A Round Table*]. Jeremy Bentham also took exception with the traditional neglect for the interests of victims of violent crimes, 1 WORKS OF JEREMY BENTHAN 589 (Limited ed. 1962), cited in Childres, N. 13, at 446.

[4] Miss Fry's pleas can be found in Fry, *Justice for Victims*, THE OBSERVER (London), July 7, 1957, page 8, col. 2, reprinted in *A Round Table* at 191, [hereinafter cited as *Justice for Victims*].

concern had been overlooked in this age of social welfare philosophy, the proponents of the compensation schemes have left no stone unturned in seeking justifications for their proposals. Although the various rationales are somewhat difficult to classify because of their similarity, the arguments generally fall into three categories: (1) the historical victim-society relationship; (2) the state liability theory; and (3) pragmatism in the modern welfare state.

Of particular appeal to most protagonists of compensation schemes is a historical study of the evolution of modern views concerning the relative positions of the offender, the victim, and the state in the spectrum of law enforcement.[5] The thesis of this argument is that society has a particular responsibility to victims of violent crime, since the state, by interposing criminal sanctions, preempted the victim's historical private rights of redress.[6]

"The basis of primitive and early Western criminal law was personal reparation by the offender or the offender's family to the victim."[7] In primitive society private offenses against individuals were not considered a sufficient threat to society to warrant public prosecution.[8] Social control was in the hands of the kindred or the clan of the victim.[9] When a wrong was perpetrated on a member of the tribe, punishment was exacted on an "eye for an eye" procedure, which frequently resulted in a blood-feud.[10] As culture advanced, however, material goods began to take the place of blood and physical hurt as compensation to the victim.[11] Also the influence of Christianity against revenge and in favor of atonement may be ascribed as a cause of such a change.[12] Gradually, an elaborate system known as "composition" was formulated.[13] Under this system revenge by the injured party—and possibly a blood-feud-could be avoided by an acceptance of composition in goods from the offender.[14] It was at first expected by public opinion and later required by public

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[5] One of the more active proponents of compensation has professed, however, that "no scheme enacted before the division of wrongs into tort and crime has relevance today, since reparation for injury and punishment for crime were indistinguishable until the division developed." Childres at 445.

[6] *E.g.*, Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 240-41 (1965) [hereinafter cited as Wolfgang].

[7] *Id.* at 223.

[8] *A Round Table* (Mueller's view) at 224.

[9] Wolfgang at 223.

[10] 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 450 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND].

[11] Wolfgang at 224.

[12] 2 POLLOCK & MAITLAND at 452.

[13] *Id.* at 451.

[14] *Id.* at 450.

authority that a feud not be pursued unless proper composition failed.[15]

Evidence of various forms of composition can be found among all of the early German nations. In Anglo-Saxon law the payments took two distinct forms, both of which were required of the offender: (1) *bót*, a payment by the offender to the injured party or his kin in order to "buy back the peace he had broken;" and (2) *wíte*, a public fine payable to the king or one of his lords.[16]

> [E]very kind of blow or wound given to every kind of person had its price, and much of the jurisprudence of the time must have consisted of a knowledge of these preappointed prices. Gradually more and more offences became emendable; outlawry remained for those who would not or could not pay.[17]

In England during the twelfth century this elaborate system disappeared with "marvellous suddenness."[18] This revolution and reconstruction in the domain of criminal law can be attributed to several political, social, and economic factors,[19] chief among which was the avarice of those in control of government.[20] In time, the *wíte* became a prime source of governmental revenue. With the increase in the pecuniary value of the right to punish, the king and his lords assumed a more prominent role in the administration of justice.

> Gradually the social group began to take charge of punishment, and wrongs came to be regarded as injuries to the group or to the state. The king claimed a part of this payment or an additional payment for the participation of the state in the trial and for the injury done to the state by the disturbance of the peace. About the twelfth century the victim's share began to decrease greatly and the exactions of the king increased, until finally the king took the entire payment. . . . Thus, the right of the victim

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[15] 1 POLLOCK & MAITLAND 46; 2 POLLOCK & MAITLAND 450-51.

[16] 2 POLLOCK & MAITLAND 451.

[17] *Id.*

[18] *Id.* at 458.

[19] Some of the attributable factors are: (1) "the relaxation of the bond of kinship which was caused by the spread of vassalage;" (2) "the debasement of the great bulk of the peasants . . . which gave their lords a claim upon those chattels that might otherwise have paid for their misdeeds;" (3) "delimitation of the field of justice between church and state, which left the temporal power free to inflict punishment without first going through the ceremony of demanding an almost impossible atonement;" and (4) "general discontent with the oppressive proportions of "pre-appointed *bót* and *wíte*, which paid no heed to the offender's wealth." 2 POLLOCK & MAITLAND 462. *See also* WALSH, A HISTORY OF ANGLO AMERICAN LAW 299-300 (2d ed. 1932); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 374 (2d ed. 1936).

[20] Wolfgang at 228.

> to receive compensation directly from the one who caused him personal harm in an assault was transferred to the collective society where it remains to this day.[21]

In this process the victim's right to the old pre-appointed *bót* gave way to damages assessed by a tribunal.[22] Hence the interests of the sovereign in punishing private offenses became superior to those of the individual, who was relegated to a civil tort action to seek his redress.

The subordination of the victim's claim becomes even more prominent when viewed in the light of modern criminal procedure.

> The basis of early law was personal reparation by the offender to the victim, a concept of which modern criminal law has almost completely lost sight. The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasizes the reformative aspects of punishment. Indeed in the public mind the interests of the offender may not infrequently seem to be placed before those of his victim.[23]

By interposing criminal sanctions the state not only impairs the victim's private remedy, but also it frequently leaves him completely without a remedy. It is argued that the state should assume some responsibility for the fact that the victim cannot be compensated because the offender has been imprisoned or perhaps killed by the state, thereby preventing him from earning money that could compensate the victim.[24] A number of years ago a report of the Paris Prison Congress recognized these inequities:

> The guilty man, lodged, fed, clothed, warmed, lighted and entertained at the expense of the state in a model cell . . . has paid his debt to society; he can set his victim at defiance; but his victim has his consolation; he can think that by [the] taxes

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[21] *Id.*

[22] 2 POLLOCK & MAITLAND 458-59.

[23] Home Office, *Penal Practice in a Changing Society*, CMDN. No. 645 at 7, cited in Comment, *Compensation to Victims of Violent Crimes*, 61 NW. U.L. REV. 72, 76 (1966).

[24] Childres at 456. *See also*, SUTHERLAND & CRESSEY, PRINCIPLES OF CRIMINOLOGY 278 (6th ed. 1960). *Note, however:*

This argument assumes, of course, that the perpetrator of the crime is known and amenable to service, whereas much of the consternation and dissatisfaction aroused by news of a victim of criminal violence derives from the fact that there is no scapegoat available.

A State Statute to Provide Compensation for Innocent Victims of Violent Crimes, 4 HARV. J. LEGIS. 127, 128 (1966).

> he pays to the treasury, he has contributed toward the paternal care which has guarded the criminal during his stay in prison.[25]

Furthermore, in the rare situation in which an accused assailant is sufficiently solvent to compensate his victim, he is confronted by a problem frequently engendered by the elaborate criminal trials of today. As explained by one modern jurist, "[O]ne effect of requiring the accused to employ his available funds to pay the costs of his defense may be to exhaust or limit the funds from which the victim may recover in a civil suit for damages against the accused."[26] Also, where fines are imposed the state usually profits to the detriment of the victim.[27]

Finally, preemption by the state in criminal prosecution has created evidentiary limitations for the victim should a civil action follow. By the weight of authority in the United States evidence of a criminal judgment of conviction or acquittal is not admissible in a subsequent civil suit.[28] As a result of this technical and, particularly in felony cases, illog-

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[25] THE PARIS PRISON CONGRESS, 1895, SUMMARY REPORT (London), *cited in* Comment, *Compensation for Victims of Crime—Some Practical Considerations,* 15 BUF. L. REV. 645, 646 (1966).

[26] Goldberg, *Equality and Government Action,* 39 N.Y.U.L. REV. 205, 224, n. 95 (1964), [hereinafter cited as Goldberg].

[27] It is perhaps worth noting that our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice, to the detriment of all concerned. Even where fines are imposed today, the state retains the proceeds, and the victim gets no compensation.

BARNES and TEETERS, NEW HORIZONS IN CRIMINOLOGY 401 (rev. ed. 1950). For isolated instances of penal statutes permitting judicial direction of property restitution in addition to or in lieu of punishment, *see* Covey, *Alternatives to a Compensation Plan for Victims of Physical Violence,* 69 DICK. L. REV. 391, 400-01 (1965). Under federal law a court may require an offender to make restitution as a condition of probation, 18 U.S.C.A. § 3651 (1964). A California law gives the criminal court authority to levy a fine on convicted defendants in addition to other punishment provided by law. The proceeds from such fines go into an indemnity fund used to compensate victims of violent crimes. CAL. GOV. CODE § 13964 (West Supp. 1967). Even in absence of statutory authority the judge might in his discretion allow restitution in lieu of punishment. *E.g.,* Eglash, *Creative Restitution—A Broader Meaning For an Old Term,* 48 J. CRIM. L.C. & P.S. 619, 620 (1958).

[28] PROSSER, LAW OF TORTS § 2 (3d ed. 1964). Unlike Great Britain, a civil action in this country may be brought prior to the criminal prosecution. *Id.* For a collection of cases denying admissions, see Annot., 18 A.L.R.2d 1290 (1950). The reasons for this rule have been variously stated as dissimilarity of object, issues and procedure; lack of mutuality; and difference in degrees and elements of proof required. Also such evidence would run counter to both the hearsay and opinion rules and constitute prejudicial evidence against the convicted defendant in the eyes of the jury. Bush, *Criminal Convictions as Evidence in Civil Proceedings,* 29 MISS. L.J. 276 (1958).

ical rule of inadmissibility,[29] the victim is saddled with the cost of proving the offense before a civil jury without the benefit of evidence that his assailant has been convicted in a criminal proceeding.[30]

In summary, preemption by the state of the victim's historical rights of private redress, compounded by the fact that civil actions are often frustrated by modern criminal procedure, forms the basis for the historical argument for placing on the state some responsibility for reparation to victims of violent crimes.[31]

Much less persuasive is the argument that the state is primarily liable to the victim because it has failed to provide adequate police protection. An early protagonist of this view was Jeremy Bentham who argued that the costs of failures of police protection ought to be borne by the state. He concisely expressed this rationale:

> Has a crime been committed? Those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual.[32]

The revival of Bentham's case for compensation is reflected in the recent statement of former Justice Goldberg, "[T]he victim of a robbery or an assault has been denied the 'protection' of the laws in a very real sense, and society should assume some responsibility for making him

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[29] The rule led one commentator to note: "To state that a civilized community is willing to see a man hanged on such a finding of fact but to treat such a finding as a mere opinion in a subsequent case involving dollars and cents, is a reflection on the administration of justice, as well as an offense to common sense."

[30] Wright, *Evidence-Admissibility of Criminal Conviction in Civil Actions*—Hearsay 21 CAN. B. REV. 653, 658 (1943). Although the rule of inadmissibility is followed in a majority of the states, the trend seems to be to reject its more arbitrary features. *See,* MCCORMICK, EVIDENCE § 295 (1954); WIGMORE, EVIDENCE § 1671a (3d ed. 1940). Rule 63(20) of THE UNIFORM RULES OF EVIDENCE makes admissible "evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment." Admissibility is not extended to misdemeanors and traffic accidents, however. It is interesting that some European countries do not always divorce the civil from the criminal action, frequently allowing the former to be brought within the criminal proceedings. *E.g., A Round Table* (Silving's view) at 236.

[31] This rationale for a compensation scheme loses much of its appeal, however, in cases in which the offender is not apprehended. The victim of an unknown assailant has no less remedy under modern laws than under the early Germanic laws. If anything, he would seem to be at an advantage since the police today are more likely to apprehend the offender. Moreover, it is to be remembered that should the offender be apprehended, the victim's civil action may precede the state's prosecution.

[32] 1 WORKS OF JEREMY BENTHAM 589 (Limited ed. 1962), cited in Childres,

whole."[33] Other modern proponants of this theory argue that the liability of the state becomes even more strict as a result of contemporary laws which "require our people to go out into the streets unprotected."[34]

The rationale that the state should be primarily liable for violent crimes inflicted upon its citizens has had very little acceptance even among the more avid proponents of compensation schemes.[35] Perhaps one reason for rejection of this theory is that it would be inconsistent to deny that the state is not likewise liable for damages to personal property resulting from crimes.[36] Yet, none of the implemented or proposed plans go beyond physical injury. Another reason that the legal liability approach has had little acceptance is simply that it is far too vague a criterion upon which to base legal rights of reparation by the

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at 446.

[33] Goldberg, at 224.

[34] Yarborough, 111 CONG. REC. 13533 (daily ed. June 17, 1965). Miss Fry commented that "the State which forbids our going armed in self-defense cannot disown all responsibility for its occasional failure to protect." *Justice for Victims* at 193. Despite the emotional appeal of these arguments, they seem to lack convincing logic. It is difficult to determine how the prohibition of bearing arms could increase the likelihood of falling victim of a violent crime. The converse would seem more likely. A contra opinion is expressed by a number of authorities, however. *E.g.*, "By requiring citizens to refrain from carrying concealed weapons and exercising other common law privileges, the state has taken efficient means of self-protection from the citizen in return for an assumption of protection by the government." Kutner, *Crime-Torts: Due Process of Compensation for Crime Victims,* 41 N.D. LAW. 487, 498 (1966) [hereinafter cited as Kutner].

[35] *E.g.*, Childres at 455. However, the author goes on to express an opinion that there are degrees of liability, and the state is certainly secondarily liable. *Id.* at 456.

[36] Miss Fry conceded, "[C]learly, so far as offences against property go, any scheme for State insurance would be wrecked by the ease with which it could be defrauded." *A Round Table* at 193. In England the theory of legal liability of the state was rejected as ". . . dangerous, because acceptance of public liability for offences against the person could be the basis for a demand for acceptance of liability for all offences against property." Home Office, *Compensation for Victims of Crimes of Violence,* CMND. 1406 (1961), *cited in* Chappell, *Compensating Australian Victims of Violent Crime,* 41 AUST. L.J. 3, 5 (1967), [hereinafter cited as Chappell.]

It should be noted that a number of states have adopted statutes imposing liability on municipal corporations or counties for mob or riot damage to property. See generally, Note, *Municipal Tort Liability: Statutory Liability of Municipalities for Damage Caused by Mobs and Riots; New York General Municipal Law § 71: Suspension of the Statute,* 50 CORNELL L.Q. 699 (1965).

At least one critic of the compensation plans seems to think that any equitable scheme would have to cover the total amount of loss due to crime, including property. *See,* Mueller, *Compensation for Victims of Crime: Thought Before Action,* 50 MINN. 213, 218 (1965) [hereinafter cited as Mueller].

victim from the state.[37] Although accepting the idea of a compensation plan, the British Government rejected the vicarious liability theory as fallacious because:

> [W]e do not believe that the State has an absolute duty to protect every citizen all the time against other citizens: there is a distinction between compensation for the consequences of civil riot, which the forces of law and order may be expected to prevent, and compensation for injury by individual acts of personal violence, which can never be entirely prevented.[38]

Similar sentiments have been expressed in this country.[39] Moreover, immunity of the state from private civil actions is a deeply embedded legal principle in this country,[40] and although there is evidence that the rule is breaking down in some areas,[41] few would argue that the veil of immunity should be pierced for failure to provide police protection.[42]

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[37] One authority insists that the public as a whole should not assume responsibility for the victim's losses because the public is not a group so related to the primary wrongdoers as to justify the imposition of liability. *A Round Table* (Miller's view) at 205-09.

[38] Home Office, *Compensation for Victims of Crimes of Violence*, CMND. 1406 (1961), *cited in* Chappell at 5.

[39] *E.g.*, "Because society is presently not advanced as to know what causes crimes of violence or how to prevent them, prematurely to saddle society with control and prevention is fruitless and unfair . . . . Any compensation scheme will have to be based on reasons other than society's duty to prevent crime." Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 St. LOUIS U.L.J. 238, 241 (1965).

[40] An action against a governmental unit by a victim of crime seems related to both contract and tort law. The tax dollar paid by the citizen to the governmental unit is the consideration for an implied contract that he will be protected. When that protection fails, the government is liable for its breach of contract. Kutner, 34, at 497-98. *See also* RESTATEMENT OF CONTRACTS. § 90 (1932). A crime-tort action would seem to be based on the reliance theory in tort law. See RESTATEMENT (SECOND) OF TORTS § 323 (1965). The governmental unit has assumed the duty to protect its citizens from crime; when it fails to fulfill this duty, it incurs liability to the victim of its failure. This theory is expanded to its fullest by those arguing that fault should not be an element of recovery here. *See, e.g.*, Comment, *Compensation to Victims of Violent Crimes*, 61 NW. U.L. REV. 72, 87-89 (1966).

[41] *E.g.*, James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955).

[42] A recent New York case, however, may have been a step in this very direction. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) was a wrongful death action brought by the administrator of the estate of a police informer. The decedent was murdered by persons unknown after the police protection provided him was withdrawn over his protests. In reversing the lower court which had denied recovery, the New York Court of Appeals held that the City of New York owed "a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once

The third justification for a compensation plan is one that "rests on common sense rather than the metaphysics of causation and responsibility.[43] Most of the proposed and adopted plans are based on a social welfare rationale that focuses on the presence or absence of remedies available to the victim rather than searching for some abstruse legal principle. Succintly stated, the theory is this: "A price of living in society is risk of harm resulting from crime, which society itself generates.[44] Proponents of compensation argue that losses incurred by victims of crime should be imposed on society as a whole. They assert that society owes a particular obligation to the victim of crime because it has impaired his potential civil remedy against the offender, has failed to protect him from criminal injury, and, in addition, continues to tolerate recognized sources of crime.[45] Proceeding on this pragmatic principle the protagonists of compensation schemes have had little difficulty in justifying their proposals. For example, in announcing the adoption of a compensation plan the British Government stated:

> Compensation will be paid *ex gratia*. The Government do not accept that the state is liable for injuries caused to people by the acts of others. The public does, however, feel a sense of responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community.[46]

Under this public gratuity philosophy the victim has no legal right of recovery; he is merely a recipient under a social welfare program which is administered on a discretionary basis. The right to appeal from the agency's decision is therefore precluded under most of the plans.[47] This "privilege rather than a right" rationale has been sharply criticized as being inappropriately applied to compensation schemes as well as to

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it reasonably appears that they are in danger due to their collaboration." *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. It is generally agreed, however, that the rationale of this decision will not be extended beyond its factual situation, *i.e.*, a special duty of protection is owed police informers. *E.g.*, Note, *Liability for Negligent Failure of Police to Protect Informer*, 72 HARV. L. REV. 1386 (1959).

[43] Childres at 457.

[44] *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127, 129 (1966).

[45] *E.g.*, Childres at 456.

[46] Home Office, *Compensation for Victims of Crimes of Violence*, CMND. 2323 at 4, *cited in* Comment, *Compensation for Victims of Crime*, 33 U. CHI. L. REV. 531, 541 & n. 59 (1966).

[47] Provision for appeal is included in the Model Act printed in A *State Statute to Provide Compensation For Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127, 134-47 (1966). Section 601(a) provides:

The decision of the Commission after hearing shall be final unless an appeal is filed

other social welfare legislation.[48] It is argued that even though there is no obligation on the state to undertake a welfare program, and even though charitable motives underlie the legislation, the eligible claimants should nevertheless be afforded a legal right to receive benefits once the program is enacted.[49] Moreover, it seems that propagation of crime loss compensation is really no more than a call for compulsory governmental insurance[50] comparable to workmen's compensation. The fact that compensation is awarded according to actual loss rather than need smacks more of social insurance than public welfare. But unlike other social insurance programs the "premiums" for victim compensation are paid from the general tax revenue. This means that the group to which is shifted responsibility for the wrong done is society as a whole rather than a particular segment of society.[51] If this is true, victim compensation is a novel idea in this country in that it is insurance unrelated to premiums and risk factors.[52] Furthermore, if this reasoning is sound, it is novel that a beneficiary's claim under a social insurance program is considered a privilege rather than a right.

In summary, the preemption by the state of the victim's historical rights and the failure of the state to protect its citizens from criminal injury have been deemed insufficient to establish a legal right of the victim of violent crimes to look to the state for reparation. These arguments have, however, been relied upon to justify social legislation re-

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by the applicant in the [appropriate state appellate court] within thirty days. At that time the applicant shall give notice of the appeal to the Commission and the Commission shall promptly transmit the official record of the hearing to the reviewing court.

[48] *E.g.*, Rothstein, *State Compensation for Criminally Inflicted Injuries*, 44 TEXAS L. REV. 38, 49 (1965); Samuels, *Compensation for Criminal Injuries in Britain*, 17 U. TORONTO L.J. 20, 21 (1967).

[49] Rothstein, *State Compensation for Criminally Inflicted Injuries*, 44 TEXAS L. REV. 49 (1965). *See also* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

[50] *E.g.*, *A Round Table* (Mueller's view) at 219. However, Professor Childres comments that ". . . language such as 'socialized tort loss insurance' has rhetorical rather than intellectual content. . . ." Childres at 454.

[51] *See, A Round Table* (Miller's view) at 208.

[52] *See A Round Table* (Mueller's view), at 229-233. Commenting on workmen's compensation insurance, Larson says:

Unlike pure social-insurance plans, the American compensation system does not place the cost on the "public" as such, but on a particular class of consumers, and thus retains a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product.

1 LARSON, WORKMEN'S COMPENSATION § 320 (1964). A victim compensation plan apparently is "pure social insurance" in that the cost of financing it is placed on society as a whole. This seems to be in line with Miss Fry's theory of a "system of sharing risks by potential offenders." *Justice for Victims* at 192. This theory would

flecting an expression of public sympathy for the victim. Although not considered sufficient to establish any legal rights, the plight of the victim apparently distinguishes him from the ordinary welfare recipient in that the victim's award is conditioned on actual loss rather than need. Despite the fact that need is not considered a factor, an award is nevertheless considered a public gratuity under most of the compensation plans.

I. New Zealand

The Criminal Injuries Compensation Act of New Zealand,[53] which became effective on January 1, 1964, was the first legislation of its type ever to be enacted. It is interesting to note that political motives as well as humanitarian considerations prompted the legislation in that country, but nevertheless it was emphasized that the philosophy behind the program was community sympathy rather than state liability.[54]

As enacted, the plan provided only for physical injury or death resulting from a violent crime perpetrated on the person.[55] The act defines injury so as to include actual bodily harm, pregnancy, and mental or nervous shock.[56] Also, a limited measure of compensation may be

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be sound only if each potential offender (which would include everyone) were to make an equal contribution to finance the system. A fundamental defect arises, however, when the system is financed from the general tax revenues. This involves more than simple risk-spreading, for it is apparent that some citizens are more criminally inclined than others and the criminal disposition of a citizen has no relation to the amount of taxes he pays. In fact, potential criminals are more likely to be found among those who pay the least taxes. Furthermore, Miss Fry compares a compensation scheme to motorist liability insurance. The probity of this comparison fails, however, when it is considered that the rates for such insurance are established by subjective factors so that the cost to each driver has a direct relation to his accident potentiality.

One critic of compensation has commented, ". . . [T]he sole remaining question seems to be whether we should have socialized, i.e., government operated, insurance, or whether we should continue to rely on free enterprise." *A Round Table* (Mueller's view) at 219. Perhaps this is the basic question in all victim compensation debates.

[53] As this author does not have access to the New Zealand statute, references will of necessity be to secondary material citing the act. For those more fortunate the plan was implemented by Act No. 134 of 1963 (N.Z.); *cited in* Cameron, *Compensation for Victims of Crime: The New Zealand Experiment*, 12 J. Pub. L. 367 (1963), [hereinafter cited as Cameron].

[54] *Id.* at 370.

[55] *Id.* at 371. The reasons suggested for exclusion of loss or damage to property are: (1) A desire to begin cautiously; (2) considerations of expense of a scheme covering property loss; and (3) private insurance against property loss is more widespread than personal accident insurance. *Id.*

[56] *Id.* No compensation may be awarded for pain and suffering if the victim is

awarded for pecuniary loss to the victim or his dependents.[57] The act includes a schedule of twenty-seven crimes of violence that can be broadly grouped under the heads of murder, manslaughter, various categories of wounding and assault, rape and certain other types of sexual assault, disabling, endangering transport, and kidnapping.[58] Compensation is not predicated upon the apprehension of the offender, and an award may even be made where there is an acquittal because of some special defense.[59] On the other hand, conviction of the assailant is admitted as conclusive evidence of the commission of the crime unless a new trial or appeal is pending.[60]

Formal public hearings for each claim are heard before a tribunal of three appointed members. The hearings are civil in character and the civil standard of proof is expressly imported into the act.[61] As in most administrative procedure, the tribunal is not strictly bound by the rules of evidence, and awards are discretionarily made on the "balance of probabilities."[62] As an insurance against unmeritorious claims the tribunal is directed to consider in making an award the behavior of the victim which might have directly or indirectly contributed to his injury or death.[63] With the exception of lack of jurisdiction, there is no appeal from the decision of the tribunal.[64]

Awards may be made either in a lump sum or in periodic payments. A maximum award is established, and no payments can be made for an aggregate period of more than six years.[65] To prevent double payments, the tribunal is required to deduct from the amount of the

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a relative of the offender or a member of his household. *Id.* at 373. Also there is a ceiling of $1400 on compensation that may be awarded for pain and suffering. *Id.* It is suggested that compensation for pain and suffering was included because it is the only form of injury on which to base a claim in many sexual cases. *Id.* at 371.

[57] *Id.* at 373. Like pain and suffering, pecuniary loss has a specified ceiling (of $2,800). *Id.* at 374.

[58] Chappell at 3, 6 (1967). The inclusion of a schedule of crimes has been criticized as unduly restricting coverage. *E.g.*, Note, *Great Britain Approves Compensation Program for Victims of Criminal Violence*, 78 HARV. L. REV. 1683, 1685 (1965).

[59] Cameron at 371. Criminal irresponsibility of the offender is not a factor to be considered in determining compensation, Chappell at 6 n. 25.

[60] Note, *Compensation for Victims of Crimes of Violence*, 30 ALBANY L. REV. 325, 327 (1966).

[61] Cameron at 372.

[62] Chappell at 8.

[63] Cameron at 373. There is no requirement under the New Zealand plan that the crime be reported within a specified time. However, there is a one year period in which a claim must be submitted. *Id.*

[64] *Id.* at 372.

[65] Chappell at 10.

award payments received as damages from the offender and payments received or to be received from any public funds.[66] However, proceeds from a private accident insurance policy are not to be considered in determining the amount of the award.[67]

II. Great Britain

The British plan, which is non-statutory, came into effect in June, 1964.[68] At the outset the British Government stated that it preferred "to start with a flexible scheme which can be altered in the light of experience."[69] Hence, no attempt was made to provide a comprehensive list of crimes of violence as was done in New Zealand. Applications are accepted where it is shown that personal injury is directly attributable to a criminal offense.[70] There are, however, two explicit exclusions in the statute: (1) motoring offenses, except where the motor vehicle is used as a weapon; and (2) offenses committed against a member of the offender's household living with him at the time. The first exclusion is justified in that private insurance arrangements cover such injuries,

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[66] Cameron at 374. Among the government programs that might have the effect of reducing an award are the Transport Act of 1962, The Social Security Act of 1938, the Workmen's Compensation Act of 1956, and the War Pensions Act of 1954. *Id.* In New Zealand the state is subrogated to any rights that the victim might have against the convicted offender. So far little has been realized from this procedure. Chappell at 63 and n. 11. Since awards are explicitly stated to be *ex gratia* payments, it is difficult to determine how subrogation can arise where there are no legal rights against the subrogee. Apparently the relation of the state to its subjects is sufficient grounds for this statutory authority.

[67] Cameron at 374.

[68] For a comprehensive, well annotated discussion of the British plan in its first two years of operation, *see* Samuels, *Compensation for Criminal Injuries in Britain,* 17 U. Toronto L. Rev. 20 (1967) [hereinafter cited as Samuels]. That author contends that the scheme has been most successful thus far.

Also it should be noted that one state in Australia, New South Wales, has recently enacted a compensation scheme. *Criminal Injuries Compensation Act,* 1967, s. 3(a), cited in Chappell at 7. It differs from the Great Britain and New Zealand plans principally in that an award cannot be made unless the offender is apprehended and brought to trial, *Id.;* the offender must be criminally responsible unless declared otherwise in a court proceeding, *Id.* at 7 and n. 29; and the principal decision as to eligibility for and amount of compensation is a responsibility of the criminal courts. *Id.* at 9.

Unless otherwise noted, all of the material for this discussion of the British compensation scheme is taken from Chappell. An outline of the scheme may be found in Samuels at 46.

[69] Home Office, *Compensation for Victims of Crimes of Violence,* Cmnd. 2323 (1964), *cited in* Chappell at 6.

[70] The British scheme is expanded to include injuries incurred in a law enforce-

and the latter is excluded because of difficulty in establishing the facts and insuring that compensation does not benefit the offender.[71] The original plan required the commission of a criminal offense as a prerequisite to compensation. This defect was subsequently removed, however, when it became apparent that no award would be made to victims of offenders who were criminally irresponsible because of age, insanity, or other condition. In order to be compensable, the injury must result from a crime which is reported to the police without delay or which is the subject of a criminal court proceeding.[72] As under the New Zealand plan the board under the British scheme considers whether, because of provacation or otherwise, the victim bears any share of responsibility for the crime, and in accordance with its assessment of the degree of responsibility, it may reduce the amount of compensation or reject the claim altogether.[73]

The British plan contains much less formal structure than its New Zealand counterpart. The program is administered by a Criminal Injuries Compensation Board, which is composed of six members. The initial decision is made by one member of the board, but if the claimant is dissatisfied, he is entitled to a hearing before three other board members. The decision of the board is final, and there is no judicial appeal or ministerial review.

Compensation under the British plan is assessed on the basis of common law damages with two notable exceptions: (1) The rate of loss of earnings cannot exceed twice the average of industrial earnings at the time the injury was sustained; and (2) no damages are awarded of an exemplary or punitive nature. In order to prevent numerous trivial claims, a minimum degree of injury and amount of compensation is established. No ceiling on the amount of an award is provided in the plan. Compensation is calculated with regard to any payments received by the victim or his dependents from other public funds, but the award is not reduced by the proceeds from private insurance.[74] If the victim

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ment situation such as arresting a criminal or preventing a crime. Chappell at 6.

[71] This exclusion has been deemed unwise by one observer. Note, *Great Britain Approves Compensation Provision for Victims of Criminal Violence,* 78 HARV. L. REV. 1683, 1685 (1965).

[72] This amendment may be found in Samuels at 49.

[73] *Id.* at 35.

[74] Although double recovery might result where the victim has private insurance, it is in accordance with the common law that such benefits ought not be deducted since the victim has paid his premiums in order to obtain the additional benefit should the risk materialize. Samuels at 37. It seems most likely that the insurance company would limit the payments under its policy to the amount of actual loss. In this sense a compensation plan should operate to reduce the premiums on private contractual insurance.

recovers damages from the offender, he is required to repay the state. The board itself, however, cannot proceed against the offender in either the victim's name or its own name since it has no explicit statutory authorization to do so.[75] In England there is no provision for periodic payments, and all payments are in lump sum except for interim medical payments.[76]

III. California

California was the first American state to adopt a compensation program. That state's plan consists of two independent legislative acts.[77] The first act, codified as §§ 13600-13603 of the Penal Code, is designed to stimulate participation by the public in crime control and indemnify losses resulting from meritorious actions. The second act, now §§ 13960-13966 of the Government Code, provides financial aid for needy citizens who fall victim of violent crime.

Section 13600 of the California Penal Code is what is typically known as a "Good Samaritan" statute. Under this law a private citizen may file a claim for compensation with the State Board of Control if he incurs personal injury or damage to his property in preventing the commission of a crime or aiding in the apprehension of a criminal.[78] The act recognizes that the entire public benefits from such heroic actions.[79] Upon presentation of such claim the Board of Control calls a hearing at which the merits of the applicant's claim and the extent of injury or damage are determined.[80] If the board determines that the

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[75] The effect of this is that the victim files a claim with the board and does not trouble himself with a civil action against his assailant, therefore allowing the offender to escape any pecuniary loss. Through 1966 there was only one case in which the victim repaid the British board from damages collected from the offender. Samuels at 44.

[76] This procedure is criticized in Note, *Great Britain Approves Compensation Program for Victims of Criminal Violence*, 78 Harv. L. Rev. 1683, 1686 (1965).

[77] Cal. Pen. Code §§ 13600-13603 (West Supp. 1967); Cal. Gov. Code §§ 13960-13965 (West Supp. 1967). It should be noted that the latter section repealed Section 11211 of the California Welfare and Institutions Code, which was California's original compensation statute enacted in 1965. Under § 11211 aid was granted by substantially the same criteria as those used in the welfare program for aid to families with dependent children. Also, expenditures under § 11211 were not to exceed $100,000 the first fiscal year of its existence. Other short-comings of this repealed statute may be found in Note, *California Enacts Legislation to Aid Victims of Criminal Violence*, 18 Stan. L. Rev. 266 (1965).

[78] Cal. Penal Code § 13601 (West Supp. 1967). Payment for damage to property is probably justified here by reason that the citizen is considered as an agent of the state when actively participating in crime prevention.

[79] Cal. Penal Code § 13600 (West Supp. 1967).

[80] Cal. Penal Code § 13602 (West Supp. 1967).

state should indemnify the claimant, it submits a recommendation to the legislature that an appropriation be made for this purpose.[81]

It has been pointed out that claims such as defined in this statute could be presented to the legislature prior to section 13600, hence this law actually does no more than institutionalize a system for presenting such claims.[82] Also, the statute has been criticized because it includes no provision for death benefits for dependents[83] or subrogation rights by the state.[84] One other defect in the act is that, literally interpreted, compensation is predicated on the successful prevention of a crime or apprehension of a criminal only.[85] Regardless of these shortcomings of the statute, California is to be commended for recognizing meritorious actions in which one risks life and property by assisting a fellow citizen and the public as a whole.

Sections 13960-66 of the California Government Code provide for compensation to victims of violent crime. Like the other similar plans this act is restricted to losses resulting from criminally inflicted physical injury or death.[86] The crimes encompassed by the act are those "considered to be a public offense, as defined by Penal Code Section 15, whether the actor is criminally liable or not."[87] It is significant that the act applies to all needy residents of California whether criminally injured within the state or while temporarily in another state or jurisdiction.[88] Application for compensation is made by filing a claim with the State Board of Control[89] within a period of one year after the date of death or injury.[90] The attorney general is responsible for investigating the facts of each claim and submitting a report at a hearing set by the board.[91] Among the evidence to be presented at the hearing, the need of the claimant is to be specifically considered by the board.[92] Consideration of the applicant's financial condition is a radical departure

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[81] *Id.*

[82] Note, *California Enacts Legislation to Aid Victims of Criminal Violence*, 18 STAN. L. REV. 266, 268 (1965).

[83] *Id.* at 267 and n. 12; *but cf.*, CAL. PENAL CODE § 13961 (West Supp. 1967).

[84] *Id.* at 268.

[85] *Id.* at 267-68. The act provides that the board shall receive evidence showing that the ". . . claimant's actions substantially and materially contributed to the *apprehension* of a criminal or to the *prevention* of a crime; . . ." CAL. PENAL CODE § 13602 (West Supp. 1967) (emphasis added).

[86] CAL. GOV. CODE § 13961 (West Supp. 1967).

[87] *Id.*

[88] CAL. GOV. CODE § 13960 (West Supp. 1967).

[89] CAL. GOV. CODE § 13962(a) (West Supp. 1967).

[90] CAL. GOV. CODE § 13962(c) (West Supp. 1967).

[91] CAL. GOV. CODE § 13963 (West Supp. 1967).

[92] *Id.* It should be noted that California's "Good Samaritan" statute operates

from the New Zealand and Great Britain compensation schemes.[93] Furthermore, the California act provides:

> The board *shall* determine that the state should indemnify a person who files a claim pursuant to this chapter if there is need for such indemnification, except that such a claim may be denied if the claimant has not cooperated with the police in the apprehension and conviction of the criminal committing the crime. (emphasis added).[94]

This language suggests that the board is obligated, but for the exception noted, to make an award if the applicant duly files his claim and *need* is shown. The decision of the board is final, as there is no provision for judicial appeal.

The act provides that no award shall exceed the amount necessary to reimburse the claimant for necessary expenses directly related to the injury, and in no case shall an award exceed five thousand dollars.[95] Apparently, punitive damages and compensation for pain and suffering are precluded. Attorney's fees are provided for, as well as the right of subrogation by the state to any claim of the applicant against the offender.[96] Also, all awards are reduced to the extent of indemnity from any other source.[97]

Another salient feature of the California plan provides the criminal court with authority to levy, in its descretion, a fine on defendants convicted of a crime of violence resulting in the injury or death of a resident of California.[98] The proceeds from these fines are deposited in an indemnity fund from which claimants may be compensated.[99]

IV. New York

The New York compensation plan, enacted in 1966, applies to

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on a theory of indemnification for actual losses, financial need not being a statutory element of consideration. Cal. Penal Code §§ 13600-13603 (West Supp. 1967).

[93] Compensation under the New Zealand and Great Britain plans is predicated on actual loss rather than need. The consideration of financial need in California is evidence of its strict adherence to a welfare philosophy in a compensation scheme.

[94] Cal. Gov. Code § 13963 (West Supp. 1967).

[95] *Id.*

[96] *Id.*

[97] *Id.* This means that indemnification from private insurance, as well as public sources, would operate to reduce the amount of the award. It is interesting that some suggest that it might well be unconstitutional to include such a provision. Childres at 464. Aside from constitutional questions it seems grossly unfair to penalize a citizen for his prudence.

[98] Cal. Gov. Code § 13964 (West Supp. 1967).

[99] *Id.* This seems to be a constructive step toward placing the burden of in-

criminally inflicted injuries sustained after August 1, 1966.[100] A statement in the first section of the act evidences the fact that the legislature rejected any liability of the state theory: ". . . it is the legislature's intent that aid, care and support be provided by the state, *as a matter of grace,* for such victims of crime."[101](emphasis added). It is also to be noted that the New York Legislature refers to payments under the plan as "aid, care and support," not "compensation" or "indemnification." Like California, but unlike New Zealand and Great Britain, New York adheres strictly to a public welfare philosophy in its scheme in that the financial need of the applicant is an element that must be considered in granting or denying an award.[102] The act applies only to physical injuries or deaths which result from a crime as defined by the New York penal law.[103] It is not necessary that the offender be apprehended or convicted before an award may be granted.[104] Explicitly excluded from coverage are: (1) acts involving the operation of a motor vehicle, unless it is intentionally used to inflict injury;[105] and (2) crimes for which the victim or a member of his family are criminally responsible.[106] Included is a statute of limitations of a period of ninety days after the crime causing the injury or after the death of the victim in which a claim must be made.[107] Also, unless waived by the board, an injury is not compensable unless a report of the crime is made to the police within forty-eight hours after its occurrence.[108]

The act creates a Crime Victims Compensation Board which consists of three appointed members whom must have legal experience.[109] The board is endowed with substantially the same powers as other administrative agencies.[110] Unless a criminal prosecution is pend-

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demnification on the one primarily responsible for the loss. This section of the act has been sharply criticized, however. *See,* Childres, *Compensation for Criminally Inflicted Personal Injury,* 50 MINN. L. REV. 271, 280 (1965).

100 N.Y. EXEC. LAW §§ 620-35 (McKinney Supp. 1967).

101 N.Y. EXEC. LAW § 620 (McKinney Supp. 1967).

102 Not only must financial condition be considered, but the board can apparently grant an award only to a poor applicant. The act provides: "If the board . . . finds that the claimant will not suffer serious financial hardship . . . if not granted financial assistance pursuant to this article . . . the board or board members shall deny an award." N.Y. EXEC. LAW § 631(6). (McKinney Supp. 1967).

103 N.Y. EXEC. LAW § 621 (McKinney Supp. 1967).

104 N.Y. EXEC. LAW § 627 (3) (McKinney Supp. 1967).

105 N.Y. EXEC. LAW § 621(3) (McKinney Supp. 1967).

106 N.Y. EXEC. LAW § 624(2) (McKinney Supp. 1967).

107 N.Y. EXEC. LAW § 625(2) (McKinney Supp. 1967). This period may be extended up to one year by the board. *Id.*

108 N.Y. EXEC. LAW § 631(1) (McKinney Supp. 1967).

109 N.Y. EXEC. LAW § 622(1) (McKinney Supp. 1967).

110 N.Y. EXEC. LAW § 623 (McKinney Supp. 1967).

ing,[111] an examination and investigation of all claims are made by a single board member who makes a decision either granting or denying aid.[112] If the claimant is dissatisfied with the decision, he has thirty days to apply for reconsideration by the full board.[113] After reviewing the record, the board may affirm or modify the member's decision, and this action becomes final.[114] The sole right of judicial appeal is in the hands of the attorney general who may within thirty days commence a proceeding in the appellate division of the supreme court to review an award which he considers improper or excessive.[115]

All awards are paid in lump sums, except that periodic payments may be awarded to compensate for loss of earnings or support in the case of death or protracted disability.[116] The amount of an award shall not exceed actual out-of-pocket expenses, together with loss of earnings or support resulting from the injury.[117] A ceiling for loss of earnings or support payment is established at one hundred dollars a week, and the maximum aggregate award that may be granted is fifteen thousand dollars.[118] Also a minimum allowable claim is established at one hundred dollars out-of-pocket loss or two continuous weeks earnings or support.[119] In all cases the amount of the award is reduced by any payment received as a result of the injury under insurance programs mandated by law, from public funds, and from or on behalf of the person who committed the crime.[120]

Finally, the board is granted authority to determine whether the victim, by his conduct, contributed to the infliction of his injury and

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[111] If the district attorney notifies the board that a criminal prosecution is pending upon the same alleged crime, the board upon request defers all proceedings under the act. N.Y. EXEC. LAW § 625(4) (McKinney Supp. 1966).

[112] N.Y. EXEC. LAW § 627 (McKinney Supp. 1967). The single board member, if he deems necessary, can hold a hearing. *Id.*

[113] N.Y. EXEC. LAW § 628(1) (McKinney Supp. 1967).

[114] N.Y. EXEC. LAW § 628(3) (McKinney Supp. 1967).

[115] N.Y. EXEC. LAW § 629(1) (McKinney Supp. 1967). Also the comptroller may request the attorney general to begin such a proceeding. *Id.* A discussion of judicial review under the act may be found in *Legislation, Compensation for Victims of Crimes of Violence—New York Executive Law Article* 22, 31 ALBANY L. REV. 120, 124-27 (1967). The author there examines the question, "Is arbitrary and capricious action, or a decision made without substantial evidence in support of it, in and of itself a violation of constitutional due process principles and hence outside the area of permissible limitation of judicial review?" *Id.* at 125-26.

[116] N.Y. EXEC. LAW § 632 (McKinney Supp. 1967). Also provision is made for emergency interim payments of up to five hundred dollars. N.Y. EXEC. LAW § 630 (McKinney Supp. 1967).

[117] N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1967).

[118] N.Y. EXEC. LAW § 631(3) (McKinney Supp. 1967).

[119] N.Y. EXEC. LAW § 626 (McKinney Supp. 1967).

[120] N.Y. EXEC. LAW § 631(4) (McKinney Supp. 1967). By deducting any pay-

reduce the amount of the award or reject the claim altogether in accordance with such determination.[121] The responsibility of the victim for his own injury may be disregarded, however, if the injury is incurred while attempting to prevent a crime or apprehend a criminal.[122]

V. Other Proposals

The salient features of two proposed compensation plans are worthy of brief comment. The first is a federal proposal introduced by Senator Yarborough of Texas.[123] The second is a model act drafted by the Harvard Student Legislative Bureau.[124]

Senator Yarborough feels that any compensation plan should be considered in terms of social welfare rather than as establishing a true legal right.[125] The areas covered by his bill are the special maritime and territorial jurisdiction of the United States and the District of Columbia.[126] The plan calls for the creation of a quasi-judicial administrative commission to adjudicate compensation claims.[127] Covered by the

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ments made by a third party on the offender's behalf, the New York act avoids a problem that has arisen under the British scheme. See Samuels 37, 38. Proceeds from private insurance under the New York scheme do not operate against the amount of an award. In reality this is probably of little consequence since a person covered by private insurance most likely would not be considered to suffer serious financial hardship as required by section 631(6) of the act.

[121] N.Y. Exec. Law § 631(5) (McKinney Supp. 1967). This section affords the board broad powers.

[122] *Id.* This is a piteous effort of awarding those who would risk life and property to assist a fellow citizen. Although this provision has one improvement over the California "Good Samaritan" statute in that compensation is not predicated on success, it is inferior in many respects: (1) The claimant injured in a law enforcement case must show "serious financial hardship" as must other applicants. Hence, injuries resulting from meritorious efforts by financially secure persons will not be recognized. (2) There will be no compensation under the New York plan if the injury results from an accident rather than a crime in a law enforcement case. (3) There is no provision for loss of property in these situations.

[123] S. 2155, 89th Cong., 1st Sess. (1965, amended 2nd Sess., 1966) [hereinafter cited S. 2155]. Similar bills have been introduced in the House of Representatives: H.R. 11818, 89th Cong., 1st Sess. (1965); H.R. 11552, 89th Cong., 1st Sess. (1965); H.R. 11291, 89th Cong. 1st Sess. (1965); H.R. 11211, 89th Cong., 1st Sess. (1965); H.R. 10896, 89th Cong., 1st Sess. (1965).

[124] This Model Act and comments may be found in *A State Statute to Provide Compensation For Innocent Victims of Violent Crimes*, 4 Harv. J. Legis. 127, 134-47 (1966) [hereinafter cited as Model Act].

[125] Yarborough, *S. 2155 of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act*, 50 Minn. L. Rev. 255, 256 (1965) [hereinafter cited Yarborough]. Senator Yarborough used the New Zealand statute as a model in drafting his proposal. *Id.* at 258.

[126] *Id.* at 258.

[127] *Id.*

scheme are all physical injuries resulting from one of fourteen listed crimes.[128] The victim is to be compensated for expenses resulting from injury or death, loss of earning power, pain and suffering, and any reasonable pecuniary loss.[129] However, no compensation is to be allowed if the victim is a relative of the offender or a member of his household.[130] There is no appeal of the commission's decision.[131]

The Model Act drafted by the Harvard Student Legislative Bureau differs substantially from the other American schemes. Compensation is granted on the basis of economic loss under this proposal, and the financial condition of the applicant is not a factor. Thus an award is not considered a gratuity but a legal right. Because compensation is considered a legal claim under a social insurance program rather than charitable aid under a public welfare program, the applicant has the right of judicial appeal of the commission's decision.[132] The act compensates not only for criminal injuries incurred within the borders of the state, but also for those incurred by citizens of the state while temporarily in another state.[133]

The principal shortcoming of this model act is that it overemphasizes compensation for actual losses only. In accord with this theory all payments received from private insurance are deducted from an award for out-of-pocket expenses,[134] and the greater portion of such insurance proceeds are deducted from an award for loss of earnings.[135] Such deductions not only seem unwise and grossly unfair, but might also be

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[128] S. 2155 § 302, reprinted in Yarborough at 269.

[129] S. 2155 § 303. Professor Childres asserts that pain and suffering has no place in a compensation scheme. Childres, *Compensation for Criminally Inflicted Personal Injury*, 50 MINN. L. REV. 271, 278 (1965).

[130] S. 2155 § 304(c).

[131] S. 2155 § 207.

[132] Model Act § 601. As previously stated, however, there are those who would argue that legal rights are established under public welfare just as under social insurance.

[133] Model Act § 201. As the act is drafted, residents of other states will be compensated if injured while in the forum state temporarily. This seems novel in that, even without a reciprocal act, citizens of foreign states might benefit from a compensation program to which they have not contributed.

[134] Model Act § 301.

[135] Model Act § 302(1)(b). Yet the Act makes no provision for deduction of payments from other public funds. Hence, a welfare victim might receive an award from the compensation program as well as payments from other public sources, while his prudent neighbor is denied the full benefits of his private insurance.

Section 303 of the Act, which allows compensation to the spouse and dependents of deceased victims, has no such deduction provision for the reason that "some states have statutory limits on wrongful death actions, and because most lives are insufficiently insured." *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127, 133 (1966).

subject to constitutional questions.[136] Furthermore, while stressing indemnity for actual losses, the act provides compensation for pain and suffering.[137] The correlation between pain and suffering and tangible loss is difficult to ascertain.[138]

Although the various compensation schemes enacted thus far are similar in many ways, two distinct philosophies of compensation have emerged. The first, which is characteristic of the American plans, is established on a social welfare policy. Not only does the state reject any degree of liability for victims of criminal violence, but also the financial aid is made available, in the discretion of a government agency, only to those who are not able to help themselves. The second philosophy of victim compensation is that accepted by New Zealand and Great Britain. Those governments also rejected the theory of state liability, but at the same time adopted compensation schemes that do not distinguish different classes of victims. Acceptance by the state of primary liability to its citizens for criminally inflicted injuries is a third approach to compensation which no jurisdiction has thus far accepted.

VI. Thought Before Action

Hasty legislation which proves wasteful and inept is an unappealing alternative to no legislation at all. It has become evident that public emotions are stirred by the plight of the victim of violent crime. It is well to remember, however, that the focal point of public attention often has no objective significance other than a source of fuel for political debate. Even assuming that a victim compensation scheme can be theoretically justified, there remains the question of necessity for such an undertaking. Justifiable need depends on the existence of a social vacuum, *i.e.*, a class who have suffered a wrong and are without remedy. Some of the pertinent issues deserving consideration there are the extent of irreparable losses, victim culpability, benefits of compensation weighed against social cost, and alternatives to state compensation.

VII. Existing Means of Reparation

The alarming increase in criminal violence in the past few years evidences the urgency for remedial action in this country.[139] If we must resolve ourselves to a program of indemnification rather than preven-

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[136] *E.g.*, *A Round Table* (Weihofen's view) at 210.

[137] Model Act § 302(2).

[138] *See*, Childres, *supra* note 3, at 463 and n. 90.

[139] *See*, Kutner at 487 and n. 1.

tion, we should preface any action with findings of an appreciable degree of irreparable losses among crime victims. Irreparable loss, however, is indeed a difficult element to ascertain. A summary observation of existing means of reparation sheds some light on the complexity of this problem.

It can be asserted with a degree of certainty that all compensation schemes will overlap to some extent with other means of indemnification, both private and public. This is substantiated by the fact that all the plans provide for reduction of the award by payments received elsewhere and the right of subrogation in the state. To what extent will this duplicity of means of redress exist?

Civil remedies: It is generally agreed that criminals as a whole are notoriously insolvent, rendering tort actions of little value in most cases.[140] However, this is not to foreclose the possibility of retribution from the offender in all cases. Although there is limited statistical information available, it seems quite certain that many offenders are required to answer for their misdeeds in the civil as well as criminal courts.

Contractual insurance: The number of victims indemnified through private accidental insurance involves not only statistics on policy holders, but also—for compensation purposes—that abstract number of persons who are not covered solely because of lack of due diligence. "In 1964, when the population of the United States was 192,119,000, more than 151,123,000 persons had hospital expense insurance; 140,667,000 had surgical expense insurance; 108,717,000 had medical expense insurance; and 47,001,000 had major medical insurance. In the same year 48,171,000 of the 68,517,000 wage earners had loss-of-income insurance."[141] These figures are a clear indication that a goodly number of crime victims look to private insurance companies for reparation. It is not to be overlooked, however, that a high percentage of victims will be found among low income families who cannot afford insurance premiums.[142] Also, many contractual insurance policies do not cover injuries inflicted through criminal actions.

Compulsory governmental insurance: Included in this source of potential victim redress is workmen's compensation, social security and medicare, and unemployment insurance. Practically all of our work-

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[140] *E.g.*, Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS U.L.J. 238, 243 & n. 24 (1965).

[141] HEALTH INSURANCE INSTITUTE, SOURCE BOOK OF HEALTH INSURANCE DATA (1965); BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. (1965), *cited in A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127, 129 (1966).

[142] Childres, *supra* note 3, at 457.

men's compensation programs, both state and federal, provide payments for criminally inflicted, on-the-job injuries.[143] Victims might also benefit from Medicare, Social Security, or other federal assistance programs. Also, a victim might draw unemployment insurance in certain situations.[144]

Other public funds: In the modern welfare state an injured victim may look to a number of state welfare programs for assistance. Examples of such programs in this state are aid to the permanently and totally disabled,[145] aid to needy blind,[146] aid to dependent children,[147] and hospitalization and medical aid.[148]

Charity: For those who are unable to purchase private insurance and are ineligible for state assistance, charitable hospitalization, medical aid, and various other relief funds are usually available. Although this may be a far cry from satisfactory reparation for losses suffered, it nonetheless evidences still another means of redress for victims of crime.

The myriad sources to which the injured victim can presently look for some degree of indemnification might warrant a *caveat* for compensation purposes. This is not to say that the existing remedies are pirical information should be compiled before an assessment of adequacy

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[143] *E.g.*, MISS. CODE ANN. § 6998-02(2) (1956). Of course the number of crimes covered here is substantially reduced by the requirement of proof that the crime was work-connected. It is noteworthy that wage earners frequently recover under workmen's compensation if injured, through crime or otherwise, when pressed into public duty at the request of a public officer. See 1A LARSON, WORKMEN'S COMPENSATION LAW § 47.42(c) (1967).

[144] *E.g.*, MISS. CODE ANN. §§ 7368 through 7446 (1956). Some constructive thought for victim compensation plans might be drawn from state unemployment insurance. This program is funded partly by federal aid, *i.e.*, the Unemployment Trust Fund pursuant to § 903 of the Social Security Act; and partly from those who benefit from the program. *See* MISS. CODE ANN. §§ 7390-93 (1956). Might it not be feasible for each resident of the state to contribute to a similar fund for victim compensation? The amount of contribution might even be established so as to be directly related to the risk factor of each contributor, *i.e.*, his protentiality of becoming a criminal. Such a program would be comparable to requiring every resident of the state to post a peace bond—the amount of the bond being determined according to the criminal record of the person applying for the bond.

If this approach proved impracticable because of difficulty of collection, a similar program might be funded through a sales tax. This also would have the effect of spreading premium costs so that most potential beneficiaries of the fund would make some contribution thereto. Such a plan would be further perfected if the tax were assessed only on those products which can be criminally linked—for example, guns, knives, ammunition, and alcohol.

[145] MISS. CODE ANN. §§ 7270 through 7290 (1956).

[146] MISS. CODE ANN. §§ 7248 through 7269 (1956).

[147] MISS. CODE ANN. §§ 7171 through 7184 (1956).

[148] MISS. CODE ANN. §§ 7145-01 through 7146.5-17 (1956).

VIII. Victimology

Not only is there a paucity of data concerning actual losses the adequate, or even partially adequate, but it is to assert that more em- of existing systems can be intelligently determined.[149]
victim is suffered to bear, but also there is a lack of information—and not infrequently concern—on the ramifications of victim culpability. "Victimology" was first enunciated by Professor Hans von Henting in his book, *The Criminal and His Victim,* in which he stated:

> [T]hat the victim is taken as one of the determinants (of composite causations of crime), and that a nefarious symbiosis is often established between doer and sufferer may seem paradoxical.[150]

A decade later another noted criminologist reached the conclusion that twenty-six percent of all violent crimes are victim-precipitated.[151] One critic has observed, "[n]early all researchers found the victim to play a dual role; one inviting compassion—the obvious, official, overt role; another inviting blame—the hidden, heinous, heuristic role."[152] The ratio of victim-precipitated crimes seems to be particularly high in rape accusations. Most authorities agree that there is a fantasy of being raped, almost universal among women, which might easily be translated into actual belief and memory falsification.[153]

Statistics in this area lend further credulence to theories of victim culpability. For example, a 1964 FBI Crime Report shows that about two-thirds of all aggravated assaults were committed between members of families or acquaintances.[154] Moreover, thirty-one percent of the murders in that year were within the family; twenty-two percent arose from lovers' quarrels or romantic entanglements; and seventeen percent

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[149] A constructive step toward such determination was taken in California recently. A three-year study was begun in that state for the purpose of compiling a comparative analysis of sixty persons who during 1965 and 1966 were granted compensation under provisions who would have been granted such compensation during 1963 and 1964 had the plan been in effect at that time. *See* Geis, *Experimental Design and the Law: A Prospectus for Research on Victim-Compensation in California,* 2 Calif. West. L. Rev. 85 (1966). This study should offer valuable data for those states yet pondering compensation.

[150] von Hentig, The Criminal and His Victim iii (1948), *cited in* Mueller at 214.

[151] Wolfgang, Patterns in Criminal Homicide 254 (1958).

[152] Mueller, *supra* note 36, at 214-15.

[153] *A Round Table* (Weihofen's view) at 210-11.

[154] FBI, Uniform Crime Reports 8 (1964).

from drinking situations.[155]

The more avid proponents of compensation regard this evidence as demonstrating only that crimes are victim-precipitated in a few isolated instances. They insist that victims as a class cannot be held to invite crime.[156] Although there is admittedly insufficient knowledge on victimology, it is significant that most of the compensation plans direct the agency to consider the degree of responsibility of the victim for his own injury.[157] Such evidence will be difficult to obtain in most cases, however, particularly where the offender is not apprehended. This problem is alleviated somewhat because compensation is usually denied where the offender and victim are members of same household.[158] This provision no doubt greatly reduces the scale of the programs.[159]

The mystery of victim culpability is one of the considerations that has led some to take issue with proposals of victim priority over other classes of unfortunates. One critic has asked, "[W]hy alleviate the suffering of victims of violence and not, for instance, that of the farmer who, while working in his field, is struck by lightning . . .?"[160] The protagonist of compensation answers this query on the somewhat shaky ground that crime is a product of society, whereas flood, fires, and other natural disasters cannot be attributed to mankind.[161] This position is perhaps further substantiated by the historical arguments discussed earlier,[162] yet it should be recognized that the case for victim compensation is not airtight.

IX. Social Cost of Compensation

Isolation of an irreparably injured segment of our populace and determination that society owes a distinct responsibility to this class do not complete the foundation for a compensation plan. The probity of compensating victims of crime must be measured not only against the fairness of imposing their losses on others but also against the social costs of such programs in relation to the benefits realized. Even conced-

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[155] *Id.* at 7. It is significant that a large number of victims are would-be offenders: "In many cases the victim has most of the characteristics of an offender; in some cases, two potential offenders come together in a homicide situation and it is probably only chance which results in one becoming a victim and the other an offender." Wolfgang, Patterns in Criminal Homicide 265 (1958).

[156] Childres, *supra* note 3, at 468-69.

[157] *E.g.*, N.Y. Exec. Law § 631 (5) (McKinney's Supp. 1967).

[158] *E.g.*, Samuels at 31, 32.

[159] *Cf.*, FBI, Uniform Crime Reports 7 (1964).

[160] *A Round Table* (Miller's view) at 204.

[161] *See*, Childres, *supra* note 3, at 453.

[162] *See* notes 5-22 *supra.*

ing that society as a whole, whether at fault or not, is the proper group on which to shift the burden of criminal losses,[163] there is the further consideration of various uncertain aspects of compensation. For example, can such an undertaking be justified in the light of its financial cost?[164] Can the program be properly administered so as to assure that only deserving victims will be compensated?[165] Are compensation schemes an unnecessary encroachment on private insurers, and is there a danger that these plans might be expanded to cover property losses also?[166] Finally, what effect will victim compensation have on the community conscience toward crime?[167]

X. Alternatives to Compensation

Unfortunately, most current debates concerning crime victims have hastily led to conclusions of state compensation as the transcendental answer, thereby ignoring all feasible alternatives. An occasional panacea suggested as a substitute to state compensation is restitution by pris-

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[163] There are those who vigorously maintain that society as a whole has no place on the nexus with criminal violence. *E.g.*, *A Round Table* (Miller's view) at 205-209.

[164] The estimates of financing a compensation program range from an insignificant amount, *A Round Table* (Fry's view) at 193, to an astronomical amount, see Mueller, *supra* note 36, at 218-219. During the first two years of the British plan there were 4,040 applicants who were paid a total of 727,953 pounds. Samuels at 49. The cost of the New Zealand program should be substantially less. See Chappell 11. Note that this does not include administrative costs. Also it is significant that the crime rates in these countries are much lower than in the United States.

[165] Problems of administration have plagued a number of commentators. *E.g.*, Rothstein, *State Compensation for Criminally Inflicted Injuries*, 44 Texas L. Rev. 38 (1965). No doubt there will be some fraudulent claims, but this is generally considered one of the necessary evils of the program. For example: "Even if one-fourth of all victims were led psychologically to crave pain, injury, or death, however would this fact lead one to divest the other three-quarters of claims they might otherwise have?" Childres, *supra* note 3, at 469.

[166] Already there is evidence that at least one of the jurisdictions with compensation has considered a plan encompassing property loss as well as personal injury. See Cameron at 371. Professor Inbau has referred to the victim compensation movement as "the kind of thinking that could lead us into an abandonment of all notions of individual responsibility and a resort to complete dependence upon governmental paternalism." *A Round Table* (Inbau's view) at 202.

[167] One opinion is that compensation might cause a reluctance on the part of the victim to testify against his assailant in a criminal trial. *See, A Round Table* (Inbau's view) at 203. Others feel that the existence of a compensation plan will have a desirable psychological effect on the community. *E.g.*, Cameron at 375.

oners.[168] Although this would have the desirable effect of imposing primary liability on the offender, it would necessitate considerable modification of our present prison system. The British rejected ideas of such major penal reform as impracticable.[169] Others have criticized prisoner restitution as being comparable to imprisonment for debt and as having a detrimental effect on rehabilitation.[170] Moreover, it is emphasized that such undertakings have failed in the past.[171] Nonetheless, restitution by the convicted offender has prompted favorable reaction in some parts. For example, a California statute creates a compensation fund partly financed by criminal fines, and a New York law permits restitution as a condition of probation.[173]

A few enterprising voices persist to assert that private contractual insurance should not be abandoned as an inadequate remedy for criminal losses.[174] This argument emphasizes that the large number of Americans presently insured is manifest evidence that the insurance industry can amply satisfy the victim's needs.[175] The premise that most citizens can adequately protect themselves from criminal loss through private insurance is unquestionably well grounded. The force of the argument weakens, however, when it is taken into account that those most likely to suffer criminal injury are those who least may be expected to insure.[176]

Finally, there are those who express the opinion that the best insurance against criminal loss is effective crime prevention. The conviction of these theorists is that our efforts should be directed toward more positive steps in upgrading present institutions in order to subjugate crime rather than accept it as inevitable.[177] But even the most optomistic reformers acknowledge that crime is endemic to our society and probably could never be completely subdued.[178]

XI. Conclusion

From this analysis of victim compensation certain generalized ob-

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[168] *E.g., A Round Table* (Miller's view) at 208-209.

[169] Comment, *Compensation for Victims of Crime*, 33 U. Chi. L. Rev. 531, 536 n. 26 (1966).

[170] *A Round Table* (Silving's view) at 245-246.

[171] Childres, *supra* note 3, at 450.

[172] Calif. Gov. Code § 13964 (West Supp. 1967).

[173] N.Y. Code Crim. Proc. § 932(j) (McKinney 1958).

[174] *E.g., A Round Table* (Mueller's view) at 229.

[175] *See generally*, Starrs, *A Modest Proposal to Insure Justice for Victims of Crime*, 50 Minn. L. Rev. 285 (1965).

[176] *See*, Childres, *supra* note 3, at 457 and n. 64.

[177] *A Round Table* (Mueller's view) at 235-236.

[178] *Id.* at 236.

servations emerge. The focal point of modern criminal law has long been the criminal—his rights, his punishment, and his rehabilitation. Suddenly a social reformer discovered the victim, whose existence had so long been ignored. Instantaneously, justifications for advancing the victim to the top of the list of unfortunates began to be heard from many academic circles. The historical deprivation of victims' rights by the state has led to firm convictions that a special responsibility is owed this individual. Although appealing in theory, this argument seems self-dismantling in that it requires the premise that civil actions against criminals are of little or no value. It is difficult to determine how modern criminal procedure deprives the victim of anything more than revenge against an insolvent assailant. Surely the means has not yet been devised with which to correlate revenge and financial compensation. Failure of police protection has likewise been generally rejected as far to vague a criterion upon which to establish legal claims against the state.

Those compensation programs which have come into existence have clearly been restricted to legislative manifestations of community sympathy. Moreover, compensation in this country has been relegated to purely a welfare role. This is an anomalous and objectionable pattern. If we are to decide that public concern expressed in monetary terms should be only for the indigent citizen, there appears to be no reason to do more than expand our present welfare system so as to meet the special needs of impoverished victims. However, if we are to accept the theory of indemnification as opposed to aid, the plan should indiscriminately encompass all citizens and be fully severed from any welfare philosophy. Thus the vital issue is whether we want socialized criminal loss insurance or merely a program of public assistance. Hybrid substitutes do no more than create expensive and needless administrative procedure.

In the final analysis the question of victim compensation is one of vast complexity which has only begun to be explored. The novelty of compensation, compounded by its emotional appeal, tends to prompt action without proper reflection. Few can argue that the victim of violent crime is not a proper object of public concern. The pendulum on which hinges our sense of justice has swung much too far in the criminal's interest. However, before prematurely deciding on the proper avenue of approach, the full dimensions of victim compensation should be explored. This will require compilation of myriad information from areas in which we now have very limited knowledge. Also, perhaps recognition of the mounting duplicity in our existing governmental assistance programs will lead to a revaluation of our present efforts to alleviate social evils.

H. Donnie Brock

AN ANALYSIS OF THE MISSISSIPPI DEAD MAN STATUTE

I. Introduction

The purpose of this Comment is to promote the repeal of the Mississippi Dead Man Statute. A study of the cases arising under this statute is included to illustrate the effects of this exclusionary rule of evidence. Many proposals have been made to liberalize the rules of evidence to allow the introduction of all relevant and material evidence;[1] repeal of the Dead Man Statute has been one of the primary targets. Today there is little justification for excluding relevant and material evidence.

At common law parties and other persons having a direct pecuniary or proprietary interest in a lawsuit were excluded from testifying.[2] It was thought the temptation to lie was too great to allow anyone who had an interest in the case to testify.[3] The danger that some might lie was thought to be sufficient justification to prevent all from testifying. In the 19th century it was recognized that this rule prevented more honest claims from being presented than dishonest claims. The old common law interest rule was abolished in all states.[4] Everyone, whether they had an interest in the case or not, was competent to testify.

However, such a hue and cry was raised over the possibility of fraud against the estates of the insane and the deceased that an exception to this general rule was created. This exception generally prevented a party to a lawsuit from establishing by his own testimony a claim or defense against the estate of the insane or deceased.[5]

The Dead Man Statute is justified on the ground that death has sealed the lips of one party, so the law should seal the lips of the other party.[6] It is contended that without such a rule, dead men's estates would be subject to false claims based on the testimony of dishonest

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[1] *See* 1 J. Wigmore, Evidence §§ 8a, 8b, 8c (3d ed. 1940) [hereinafter cited as Wigmore]; Uniform Rules of Evidence (1953); Model Code of Evidence (1942).

[2] 2 Wigmore § 575-76.

[3] *Id. at* § 576.

[4] *Id. See* Miss. Code Ann. § 1688 (1956).

[5] The Mississippi Dead Man Statute is found at Miss. Code Ann. § 1690 (1956).

[6] 2 Wigmore § 578; *e.g.*, Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913), *suggestion of error overruled*, 104 Miss. 776, 62 So. 432 (1913).

witnesses.[7] This same assumption was made in justifying the old common law interest rule barring anyone who had an interest in the lawsuit from testifying. The reasoning here is simple—given the opportunity men will lie to establish their own claims.

II. Interpretation of the Mississippi Dead Man Statute

Mississippi repealed the common law interest rule in 1857. The Dead Man exception, however, was written into the statute. The statute provided that "no person shall be a witness in any suit by, or against himself to establish his own claim to an amount exceeding fifty dollars, against the estate of a deceased person."[8]

The statute in effect today was enacted in 1896[9] The present statute applies both to dead men's estates and to estates of the insane. The statute does not apply to claims which arise during the administration of an estate. Because this is a statutory exception to the general rule that all witnesses are competent to testify, the particular wording of the statute is extremely important. The statute reads as follows:

> A person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent. But such person so interested shall be permitted to give evidence in support of his claim or defense against the estate of a deceased person which originated after the death of such deceased person in the course of administering the estate. Nor shall a person testify as a witness to establish his own or assigned claim or defense against the estate of a person of unsound mind, which originated before the ward became a non compos mentis. But this shall not apply to claims or defenses which arose in the course of administration of the estate of such person.[10]

Claim or Defense

There has been a great mass of litigation over what constitutes a "claim or defense" within the meaning of the statute. The Mississippi Courts have consistently given this term a very broad and literal mean-

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[7] 2 Wigmore § 578; *e.g.*, Jacks v. Bridewell, 51 Miss. 881 (1876).

[8] Revised Code of 1857, § 190, p. 510.

[9] Laws of 1896, ch. 99, p. 107.

[10] Miss. Code Ann. § 1690 (1956).

ing. An early case held that the statute applies equally to contract and tort actions.[11]

The leading definition of what constitutes a claim against an estate is found in *Jacks v. Bridewell*[12] where the court stated

> The term 'estate of a deceased person' is used, in its broad and popular sense, to signify all the property of every kind which one leaves at his death. Therefore, any 'right' asserted against real or personal property left by a deceased person, as accrued to the party by virtue of a dealing between him and such person since deceased, renders the person asserting it incompetent as a witness to maintain in his own behalf such an assertion of right. The exclusion is not confined to cases in which the controversy is between him who would testify to his 'claim' or 'right' and the administrator or executor of the deceased person, but it extends to every assertion of such right by a party to any part of the estate left by a deceased person, and claimed by such party, or to be subject to his demand, by reason of an alleged transaction between such party and the deceased person.[13]

This broad definition of a claim against an estate has been cited numerous times with approval. The result is that the Mississippi statute applies to a broader range of cases than the statutes of many states.[14] The broad definition given "claim" applies with equal force to the meaning of "defense." When the estate of the decedent brings suit, the defendant cannot establish his defense by testifying to facts which occurred during the lifetime of the decedent.[15]

A party is not only prevented from establishing his claim where he had personal dealings with the decedent, but he is also prevented from establishing his claim where the decedent was not present when the transaction took place. In *Brown v. Parker*,[16] the plaintiff's brother had pledged stock certificates as security for a loan. The stock had been issued to the plaintiff and was endorsed in blank. This action was brought to recover the stock from the decedent's estate on the grounds the endorsements were forged. It is important to note that there had been no dealings between the deceased and the plaintiff. The court held that the plaintiff was prevented from testifying by the statute that she had not endorsed the stock nor consented to its being used as

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[11] Lamar v. Williams, 39 Miss. 342 (1860).

[12] 51 Miss. 881 (1876).

[13] *Id.* at 888.

[14] 54 A.L.R.2d 1105 (1957).

[15] *E.g.*, Otey v. McAfee's Adm'r, 38 Miss. 348 (1860).

[16] 143 Miss. 291, 108 So. 492 (1926).

collateral. The court said that not only is a witness incompetent to testify concerning personal conversations and dealings with the deceased but that he is incompetent to testify

> as to any and all facts, circumstances, and transactions occurring during the lifetime of the deceased having a tendency to establish the claim of the witness against the estate of such deceased person, *whether such facts, circumstances, and transactions took place with, or in the presence of, the decedent or not.*[17] (emphasis added.)

The result reached in this case is in line with the concept held by the Mississippi Court that the testimony of a party establishing any claim against the estate of a decedent should be barred by the statute. The reasoning in this case is similar to that used in the well-known California case of *Corso v. Security-First National Bank.*[18] In *Corso* the plaintiff was a tenant in an office building owned by the deceased. She fell in the hall of the building and sued to recover for personal injuries. She maintained that her injuries were due to the negligence of the owner and his employees in maintaining the building. The owner died after the suit was filed. He was not present when the accident occurred and could not have testified to any of the circumstances surrounding the accident. The California Court held that the plaintiff could not testify to establish her claim since the California Dead Man Statute applied to any facts which occurred before the death of the deceased.

If the rule of *Brown v. Parker* were applied to the facts in *Corso,* Mississippi would reach the same result. These cases illustrate the harshness of the Dead Man Statute and compel this question: Was the Statute aimed at achieving this result?

After some hesitation, the Mississippi Court firmly applied the Dead Man Statute to suits involving wills. In *Whitehead v. Kirk,*[19] the decedent left all of his estate to his sisters to the exclusion of his wife. His wife brought suit to disallow the will on the ground that her husband was insane at the time the will was made. Her testimony was excluded because it would tend to establish her claim against the estate of her husband. The court reasoned that the insane acts the wife would testify to occurred during the lifetime of her husband. Therefore, the testimony must be excluded because the decedent was not present to refute the

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[17] 143 Miss. at 298, 108 So. at 493.

[18] 171 Cal. App. 2d 816, 342 P. 2d 56 (1959); *see* Note, *An Unwarranted Application of the California Dead Man Statute* 33 S. CAL. L. REV. 339 (1959-60).

[19] 104 Miss. 776, 61 So. 737 (1913), *suggestion of error overruled,* 106 Miss.

allegations of insanity brought by his wife. The court held that the word claim included anything that occurred prior to the death of the decedent.

This case in effect overruled several prior decisions which had not extended the statute this far. For example, in *Tucker v. Whitehead*,[20] the contestant and the proponents of a will were allowed to testify concerning the facts and circumstances surrounding the mutilation of a will. The court said that in

> such a case it is the part of wisdom to open the doors as wide as possible for the reception of every species of evidence at all calculated to advance the discovery of truth, since not to do so must in a great number of cases result in defeating the will of the deceased by accident or fraud.[21]

This case was dismissed in *Whitehead v. Kirk* on the ground that the sole question before the *Tucker* court was whether the decedent had mutilated the will. The *Kirk* court failed to distinguish the difference between the mutilation of a will and the insanity of a testator, in both cases facts which occurred prior to the death of the decedent were in issue.

The rule announced in *Whitehead v. Kirk* makes legatees, devisees, or heirs at law incompetent to testify in a suit contesting a will. In *Cooper v. Bell*,[22] the decedent's daughter could not testify to establish the alleged insanity of her father when he executed a codicil to his will. The court held that such testimony would tend to establish her own claim against the estate, and the facts which she would testify to occurred during the lifetime of the decedent. This brought her testimony within the prohibitions of the statute.

In cases involving wills, one exception exists to the rule that a legatee or an heir at law cannot testify concerning facts which occurred during the lifetime of the decedent. The exception is that anyone can testify to facts and circumstances which occurred prior to the death of the decedent where such testimony defeats any interest or right the witness has in the estate of the decedent. *McFadden v. Welch*[23] involved a suit by a widow and her daughter to cancel a contract executed by the widow and her deceased husband for their care and maintenance on the ground that the husband was mentally incapable. The widow and daughter were not allowed to testify to facts that would establish the mental incapacity of the decedent, but the other heirs at law of the

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706, 62 So. 432 (1913).

[20] 59 Miss. 594 (1882).

[21] *Id.* at 606.

[22] 114 Miss. 766, 75 So. 767 (1917).

[23] 177 Miss. 451, 170 So. 903 (1936).

decedent were allowed to testify to facts which established that the decedent was mentally capable of executing the contract. The reason given by the court for allowing this testimony was that their statements would reduce their right of inheritance.

In *Birchett v. Hundermark*,[24] a legatee under the will, who was not an heir at law, was allowed to testify that the decedent lacked mental capacity when he made the will. If the will was void, the legatee would receive nothing. Thus this testimony established no claim against the estate.

An heir at law who is not a beneficiary under either of two wills can testify in a will contest.[25] This exception is well entrenched in Mississippi and allows relevant and material evidence to be heard. But as with other exceptions, it can be unfair and arbitrary in many instances.

The Mississippi court has held that the statute prevents a woman from testifying to establish her marriage to the decedent.[26] In the case setting forth this proposition, if the woman could establish her marriage to the deceased, she would be entitled to a share of the estate. The court reasoned that the facts sought to be established occurred during the lifetime of the deceased and thus could not be established by her testimony. In *Martin v. Martin's Estate*,[27] this same reasoning was used to prevent a woman from testifying to establish her marriage so she could renounce her alleged husband's will.

In one unusual situation, however, the court did allow the alleged widow to establish her marriage to the decedent. In *Covington v. Frank*[28] the alleged widow and daughter of the deceased were allowed through their testimony to establish that they were the wife and daughter of the deceased. In this case a suit was filed against the unknown heirs of the deceased to foreclose a mortgage. The woman and her daughter were allowed to testify that as wife and daughter of the deceased they were the proper parties to defend the suit. The case stands alone because the court held that the rights of a widow or a child in the husband's estate do not exist until after his death. The court said

> [S]o neither wife nor child has any interest in the property of the husband and father during his lifetime; dying intestate they would be his heirs, and to prove their relationship to him is to prove their title to his property by descent when cast; but it is not to prove a claim that originated in his lifetime. . . .

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[24] 145 Miss. 683, 110 So. 237 (1926).
[25] Perry v. Aldrich, 196 So. 2d 521 (Miss. 1967).
[26] Graham v. Taylor, 117 Miss. 736, 78 So. 706 (1918).
[27] 217 Miss. 173, 63 So. 2d 827 (1953).
[28] 77 Miss. 606, 28 So. 20 (1900).

> [T]he estate of W. A. Covington did not accrue in his lifetime, and only a claim arising in his lifetime excludes them from testifying.[29]

This case was later distinguished on the ground that the estate of the deceased was only indirectly, and not directly, involved in the suit.[30]

The next two cases must be considered together to realize the full impact of the Dead Man Statute. *Cross v. Frost*[31] involved a two car accident. Only the drivers were in the cars and there was only one other witness. The surviving driver brought suit to recover for personal injuries. He could not testify because it would establish his "claim" against the estate of the deceased. If the driver of a third car had not witnessed the accident, the plaintiff would have faced an almost impossible task of establishing the cause of the accident.

Where the wrongful death statute is involved, however, a different case is presented. *Hawkins v. Rye*[32] involved a suit brought under the wrongful death statute to recover for the death of a child run over by a car. The child's father, as administrator of the child's estate, filed suit against the driver. The driver was allowed to testify. The court reasoned that the Dead Man Statute applies only where the suit is against the *estate* of the decedent. The *estate* of the decedent was held not to be involved because the action was brought by the administrator on behalf of the heirs named in the wrongful death statute. The wrongful death act created a new and independent cause of action, and it exists apart from the estate of the decedent. The estate of the decedent will not be benefited or harmed by this action. For these reasons the driver of the car could testify in his defense.

A strong dissent in this case points out that the holding of this case and *Cross v. Frost* cannot be reconciled. This illustration is given. Two cars collide. One driver is killed, the other injured. If the injured driver sues the estate of the deceased driver, he cannot testify *(Cross v. Frost)*. If the estate of the deceased driver sues the survivor under the wrongful death statute, the survivor can testify.[33] Two inconsistent results are reached solely because of the manner in which the suits are filed.

The broad application given the terms "claim or defense" has not been without protest. In *Helm v. Sheeks*,[34] the court held that an heir at law could not testify concerning the mental incapacity of the testator

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[29] 77 Miss. at 618.
[30] Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913).
[31] 227 Miss. 455, 86 So. 2d. 296 (1956).
[32] 233 Miss. 132, 101 So. 2d 516 (1958).
[33] 233 Miss. at 154, 101 So. 2d at 526.
[34] 116 Miss. 726, 77 So. 820 (1918).

to make a will. This case is in line with other cases in Mississippi holding that a legatee or heir at law cannot testify concerning facts which occurred during the lifetime of the decedent because this would constitute establishing a claim against the estate within the meaning of the statute.

The "dissent" in this case is very strong. Citing earlier Mississippi cases, the "dissent" argues that a legatee or heir at law has no right or claim in the estate of the decedent until he dies; therefore, the statute should not apply. As this "dissent" points out, in holding that a legatee is incompetent to testify in a will contest, the court has made him defenseless in many cases to charges of fraud and undue influence.

Indirect Claims

The Mississippi court has made an obvious effort to restrict the application of the Dead Man Statute in holding that the Statute applies only to *direct* claims against estates and not to *indirect* claims. In *Garner v. Townes,*[35] the court held that the estate of the testator was not directly involved in a suit to set aside the assignment of a life insurance policy by the testator to his granddaughter. The suit was brought by the testator's son. The policy insured his life, and he contended that the policy had previously been assigned to him. The son was allowed to testify to establish the facts surrounding the assignment of the policy.

In an unusual case, an heir at law was allowed to testify in a suit brought to cancel a deed of trust held by a mortgagee of the decedent. The heir testified that he had carried a written order from the decedent to the mortgagee bank transferring funds to pay the deed of trust. The court held that the transaction was between the decedent and the bank. Therefore, the decedent was not a party to this suit.[36]

The court has held that the distributee of the estate of a decedent can testify to establish a claim of the decedent against the estate of another decedent because, "[T]he statute applies to a direct claim of the witness, not to an indirect one."[37] In *Security Mut. Life Ins. Co. v. Brunson,*[38] the court held that where the estate of the decedent is not a party to the suit, a witness can testify even though the estate will eventually be liable for reimbursement of the claim. The case involved a suit to recover the cash surrender value of a life insurance policy

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[35] 134 Miss. 791, 100 So. 20 (1924).

[36] Davis v. Crawford, 175 Miss. 493, 163 So. 543 (1936), *suggestion of error overruled* 175 Miss. 493, 168 So. 261 (1936).

[37] McFarlane v. Plant, 185 Miss. 616, 626, 188 So. 530, 532 (1939).

[38] 176 Miss. 893, 170 So. 824 (1936).

which the plaintiff had delivered to his brother. His brother had obtained a loan on the policy without the plaintiff's authority. The brother died and when the insured brought suit to recover the value of the policy, he was held competent to testify. He was competent even though his brother's estate became liable for reimbursement. In a suit to establish a resulting trust by operation of law, the court said that the Dead Man Statute

> created an exception to the general rule as to the competency of a witness; and being an exception, it must be strictly construed in favor of competency of the witness.[39]

In this case Shepherd and Johnston purchased land together. Shepherd borrowed one half of the purchase price from Johnston. The deed was placed in Mrs. Johnston's name. When Shepherd paid the loan, Mrs. Johnston was to deed one half of the land to him. Johnston died and Shepherd sued Mrs. Johnston for his half of the land. Shepherd was held competent to testify because Johnston's estate was not directly involved in the suit.

Rules calculated to remove some of the harshness of a statute sometime backfire. In holding that the decedent's estate must be directly involved before the statute will prohibit testimony, the supreme court was trying to limit the scope of the statute. This rule of construction operated to give an unwarranted result in *Coleman v. Kierbow*.[40] Suit was filed by heirs of an estate to set aside a deed made by their mother giving her home to one daughter. The court held that the heirs could not testify concerning the mental incapacity of the decedent because if the deed were set aside then the property would become part of the decedent's estate. If this were accomplished, the heirs would be establishing their own claims against the estate. The heirs could not testify to set aside the deed, but the court allowed the same witnesses to testify to establish a constructive trust on their sister because the estate of their mother was not directly involved. In establishing a constructive trust, the claim was against the sister and not against the estate.

It seems strange to allow testimony that will establish a constructive trust against one heir in the same suit where such testimony is incompetent because it will establish a claim against the estate of the deceased.

The court has also held that the nominal plaintiff named in a suit can testify to establish a claim against a decedent's estate because he has

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[39] Shepherd v. Johnston, 201 Miss. 99, 106, 28 So. 2d 661, 663 (1947), *aff'd on rehearing* 203 Miss. 120, 33 So. 2d 614 (1948).

[40] 212 Miss. 541, 54 So. 2d 915 (1951).

no real interest in the claim.[41]

In *Poole v. McCarty*,[42] the court held that one party to a contract for the sale of minerals could testify even though the other party had conveyed a fractional share of his interest to a third party who had died at the time of the suit. The court approved the principle that the statute was not meant to apply to cases where there are living parties on both sides of a contract who can testify even though some of the original parties to the contract are dead.[43] The same reasoning applies when the surviving member of a partnership is sued on a debt of the partnership.[44] This is allowed even though the judgment will collaterally create a claim against the deceased partner's estate.[45] A defendant can testify in a suit brought by the surviving member of a partnership.[46] The statute does not apply to suits brought by corporations.[47]

Testimony of Spouse of Incompetent Allowed

The wife or husband of a claimant who is prohibited from testifying by the Dead Man Statute can testify to establish the claim of his or her spouse against a decedent's estate.[48] *Jenkins v. Jenkins*[49] involved a suit on a promissory note. The maker of the note was prevented by the statute from establishing a defense against the estate of the deceased, but his wife could testify that her husband had paid the note. In *Spivey v. Walton*,[50] the daughters of the deceased couple sought to prove that their parents lacked the mental capacity to make a will. They were prevented from testifying by the statute but their husbands could testify to establish their wives' claims against the estate of their deceased parents.

Claims for Personal Services

A claim for personal services furnished the decedent before his

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[41] Hedges v. Aydelott, 46 Miss. 99 (1871).

[42] 240 Miss. 341, 127 So. 398 (1961).

[43] 240 Miss. at 348, 127 So. 2d at 401. Court cited with approval this rule as expressed in 58 AM. JUR., *Witness*, § 339 at 204.

[44] McCutchen v. Rice & Co., 56 Miss. 455 (1879).

[45] Faler v. Jordan, 44 Miss. 283 (1870).

[46] Combs v. Black, 62 Miss. 831 (1883).

[47] Wiggins Turpentine Co. v. Calamity Land Co., 109 Miss. 628, 68 So. 919 (1915).

[48] *E.g.*, Rushing v. Rushing, 52 Miss. 329 (1876); Barry v. Sturdivant, 53 Miss. 490 (1876).

[49] 229 Miss. 499, 91 So. 2d 708 (1956).

[50] 107 Miss. 56, 64 So. 937 (1914).

death cannot be established by the testimony of the claimant.[51] Where the personal services are admitted by the estate, however, the claimant can testify to establish the value of the services.[52] In a suit to recover for personal services, the claimant must establish that the services were rendered and that an implied or express agreement to pay for the services was made by the decedent.[53]

Incompetent Can Lay Foundation For Secondary Evidence

A person can testify to lay the foundation for secondary evidence even though he is prevented by the Dead Man Statute from testifying directly against the decedent's estate.[54] In *Bookout v. Shannon*[55] a doctor was held competent to lay the foundation for the introduction of his books into evidence in a suit to collect his fee from the estate. This is a broad rule, and any testimony that will lay the foundation for secondary evidence is admissible. In *Harper v. Lacey*,[56] the court said:

> The statute prohibiting a party in interest from delivering testimony to establish his own claim against the estate of a decedent was not intended to abrogate the common law rule that a party in interest may testify to the loss of an instrument to lay the foundation for the introduction of secondary evidence of its contents.[57]

Waiver

The privilege granted by the Dead Man Statute can be waived. There is no partial waiver of the statute. When it is waived, it is waived in toto.[58] The court follows this standard:

> The rule appears to be well-established that the examination of one witness incompetent under the dead man's statute operates as a waiver of incompetency of adverse witnesses at

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[51] Johnson v. Odom, 202 Miss. 213, 31 So. 2d 120 (1947).

[52] Jackson v. Lewis, 24 So. 2d 532 (Miss. 1946) *as cited in* Johnson v. Odom, 202 Miss. 213, 219, 31 So. 2d 120, 121-122 (1947).

[53] Johnson v. Hannon, 211 Miss. 207, 51 So. 2d 283 (1951); Johnson v. Odom, 202 Miss. 213, 31 So. 2d 120 (1947).

[54] *E.g.*, Cole v. Gardner, 67 Miss. 670, 7 So. 500 (1890); Baldridge v. Stribling, 101 Miss. 666, 57 So. 658 (1911).

[55] 59 Miss. 378 (1882).

[56] 62 Miss. 5 (1884).

[57] *Id.* at 8.

[58] McAlister v. McAlister, 254 Miss. 877, 183 So. 2d 513 (1966).

> least where the testimony of such adverse witness is offered after the examination of the first witness, and as to matters testified to by such first witness.[59]

In *Lipson v. Lipson,*[60] the court held that the privilege was waived where the plaintiff sent interrogatories to a party who was incompetent to testify. The waiver was held to be total and was not limited to the scope of the interrogatories. The court has also held that the privilege is waived where the complainant is compelled to answer a cross-bill under oath.[61] The privilege is waived when the complaintant does not waive answer under oath.[62] There is no waiver, however, when one party introduces statements against interest made by an opponent.[63]

Making the Record

When testimony is excluded in the trial court on the grounds that it is prohibited by the Dead Man Statute, the record must show what testimony the witness would have given. Exclusion of testimony because of the statute cannot be assigned for error on appeal unless the witness is actually examined for the record or the witness is present and a statement of what the witness would testify to if allowed is placed in the transcript.[64] Even where it appears that the trial court was in error in excluding the testimony, the case will not be reversed if the record does not show what testimony the witness could have given.[65]

If testimony prohibited by the Dead Man Statute is allowed by the trial court and this testimony is supported by other evidence, the Mississippi Supreme Court will not reverse on this ground alone.[66] The case will not be reversed where the prohibited testimony is corroborated by the testimony of other witnesses.[67]

III. Criticisms of the Mississippi Dead Man Statute

The Dead Man Statute is an anachronism. It flies in the teeth of

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[59] Coney v. Coney, 249 Miss. 561, 573, 163 So. 2d 692, 698 (1964).

[60] 183 So. 2d 900 (Miss. 1966); *See* J. Bradley, E. Hodge, and W. Rainey, *1965-66 Mississippi Supreme Court Term—Some Significant Cases,* 38 Miss. L. J. 1, 43 (1966-67).

[61] Stuckey v. Sallis, 221 Miss. 698, 74 So. 2d 749 (1954).

[62] Fant v. Fant, 173 Miss. 472, 162 So. 159 (1935).

[63] Veazey v. Turnipseed, 219 Miss. 559, 69 So. 2d 379 (1954).

[64] Manning v. Hammond, 234 Miss. 299, 106 So. 2d 51 (1958).

[65] Robinson v. Humble Oil & Ref. Co., 253 Miss. 602, 176 So. 2d 307 (1965); *In re* Reinecke's Estate, 225 Miss. 376, 83 So. 2d 438 (1955).

[66] Rosenbaum v. Bohannon, 204 Miss. 9, 36 So. 2d 798 (1948).

[67] Saulsberry v. Saulsberry, 232 Miss. 820, 100 So. 2d 593 (1958); Clapper v. Powers, 222 Miss. 878, 77 So. 2d 808 (1955).

efforts to allow all relevant and material evidence to be heard by trial courts. As a stepchild of the old common law interest rule which prevented any person who had an interest in the case from testifying, the Dead Man Statute is subject to the same criticisms. Wigmore has this to say about the Dead Man Statute:

> There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. . . .
>
> . . . [I]t is based upon a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.[68]

The statute is a concession to a rule that was discarded in the 19th century. It is based on the concept that dishonest men are more numerous than honest men. If this premise is true, then we should return to the common law interest rule and disqualify all who have an interest in the case.

The basic justification given in support of the statute is that it prevents dishonest claims. It should be recognized that the statute also prevents honest claims from being established. The Dead Man Statute excludes *all* testimony of interested parties to prevent *some* false claims. Why should a claim be lost because one party dies?[69] If a man will commit perjury to establish his claim, he will certainly find some other way, or witnesses, to substantiate the claim. The philosophy behind the statute assumes that the court cannot recognize a witness's interest when he testifies to establish his own claim. Every day witnesses are disbelieved when they testify on their own behalf. Why should an exception exist here? Cross-examination and the ability of the court to separate truth from fiction are ignored by the statute.

The Dead Man Statute promotes litigation. This alone is sufficient reason to repeal the statute. There are hundreds of cases involving this statute and more in the making. It is impossible to reconcile all the decisions arising under the statute, and the longer we have this statute, the muddier the water will become.

Objection to the statute can best be illustrated by example. *Cross v. Frost*[70] and *Hawkins v. Rye*[71] were mentioned earlier and illustrate

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[68] 2 WIGMORE § 578 at 696-97.

[69] *See, e.g.*, Corso v. Security-First National Bank, 171 Cal. App. 2d 816, 342 P. 2d 56 (1959); *and* Brown v. Parker, 143 Miss. 291, 108 So. 492 (1926).

[70] 227 Miss. 455, 86 So. 2d 296 (1956).

[71] 233 Miss. 132, 101 So. 2d 516 (1958).

the difficulty in interpreting the statute. In *Cross v. Frost,* the survivor of a two car accident was prevented from testifying concerning the negligence of the other driver. In *Hawkins v. Rye,* the driver of a car was allowed to testify in his defense against an action brought under the wrongful death statute. As the dissent in *Hawkins v. Rye*[72] points out, this position is inconsistent. If we must have the Dead Man Statute, the correct result was reached in *Hawkins v. Rye* because relevant and material testimony was allowed. But why not allow the testimony in both cases?

A more typical example of the injustice created by the statute is the case where parents live their last years with one of their children. In gratitude the parents leave most or all of their estates to this child. On the death of their parents, the other children appear demanding their share of the estate and sue to have the will set aside because of a lack of testamentary capacity, undue influence or fraud. Even though under these circumstances there exists ample room for undue influence and fraud, the child who has cared for his parents should be able to defend himself against these charges. Under the statute, however, he cannot. Surely any court can recognize the interest of the defendant and take this into consideration in deciding the case. While the child cannot testify in his defense, his spouse can.[73] It is inconsistent to allow the spouse to testify and deny the child the same right.

In *Baldridge v. Stribling,*[74] a woman sued her sister for an accounting after their father's death. The deceased had lived with his daughter for the last part of his life. The daughter claimed that her father had given her $3600 to pay for his funeral, and she was to keep what was left. The court held that she could not testify concerning these facts because such testimony would tend to establish her claim against the estate. Unless secondary evidence or other witnesses are available, the defendant in such cases is defenseless. The defendant's interest in these circumstances is easy to recognize, but should this be sufficient justification to prohibit him from testifying?

The Dead Man Statute becomes even more illogical when a claimant who has had no personal contact with the decedent is prevented from establishing his own claim against the estate. In *Brown v. Parker*[75] the claimant was prevented from establishing her allegations of fraud even though she had no personal dealings with the decedent. The philosophy that death has sealed the lips of the decedent so the law should

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[72] *Id.* at 154, 101 So. 2d at 522.

[73] *E.g.,* Rushing v. Rushing, 52 Miss. 329 (1876); Jenkins v. Jenkins, 229 Miss. 499, 91 So. 2d 708 (1956).

[74] 101 Miss. 666, 57 So. 658 (1911).

[75] 143 Miss. 291, 108 So. 492 (1926).

seal the lips of the survivor contemplates a personal relationship between the parties. This justification for the statute fails completely in fact situations such as *Brown v. Parker* where there was no record of personal dealings between the claimant and the deceased. Why not allow the parties to present their evidence and allow the court to decide the issues instead of handicapping one party?

There was a mixed response from judges in the state in answer to a letter requesting their opinions on whether the Dead Man Statute should be kept, repealed or altered. Chancellor George William Haynes expressed the view of many by stating that the repeal of the statute "would tend to 'let down the gap,' so to speak, for a veritable flood of fraudulent claims;"[76] or expressed by Chancellor William G. Hewes, the statute closes "the door to what could become flagrant and widespread fraud in estate matters."[77] These views are in keeping with the traditional reasons given in support of the statute. This fear may well be justified, and this issue is identified as part of a larger problem by a member of the Mississippi Supreme Court. This Justice stated that he believes the real issue is perjured testimony in general, not just on the part of those who have an interest in the case. He states

> that perjured testimony is one of the biggest problems in the administration of law. Nobody talks about it and very few admit its frequency. It is a thing that is incapable of exact appraisal because there are no figures on the question. This statute was intended to even the balance where one party is dead. It is true that in many cases this closes the mouth of the only living person who knows the facts about a claim or a lawsuit. It works both ways—the dead man cannot speak and I can hardly say that any great amount of injustice results from application of this statute, and it is entirely probable that a much greater injustice would result if it were repealed.[78]

Chancellor William H. Bizzell expressed the view of those who favor repeal, or some alteration, in the statute by stating:

> There are certainly some instances in which the statute prevents the establishment of unjust or doubtful claims against the estate. But there are probably more instances in which the statute prevents our hearing testimony which is necessary and proper and just.[79]

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[76] Letter from Chancellor George William Haynes to author.

[77] Letter from Chancellor William G. Hewes to author.

[78] This view was expressed in a letter to the author by a member of the Mississippi Supreme Court who wished to remain anonymous.

[79] Letter from Chancellor William H. Bizzell to author.

IV. Alternatives

Several alternatives exist to the Dead Man Statute. These alternatives have been tried in other states and have proven to be workable. There are three basic alternatives: (1) permit the interested party to testify if in the discretion of the trial court justice so requires; (2) permit the interested party to testify if his testimony is corroborated by other evidence; and (3) permit the interested party to testify and allow any relevant declarations by the deceased to be admitted as an exception to the hearsay rule.[80]

The first of these alternatives is followed in Montana and Arizona. In both states, the statutes provide for the exclusion of testimony by an interested party in typical terms but provide that the trial judge has the discretion to admit testimony by the interested party when it appears to the court that its exclusion would cause injustice.[81] The problem with this exception is that through the decisions of the appellate courts, fixed rules are established limiting to set circumstances when the testimony can be admitted. This has severely restricted the usefulness of this rule.[82]

The second alternative would allow the prohibited testimony but would not allow a verdict for the claimant unless the testimony is corroborated.[83] These statutes offer some improvement over the typical Dead Man Statute but such statutes retain the same basic philosophy. All uncorroborated claims must be disregarded. The interested party will still lose if he is the only one who can testify to establish the claim. There is some difficulty in defining corroboration in the statute so that this term will not become the subject of extensive litigation.

The third alternative allows any interested party to testify. It also creates a special exception to the hearsay rule which allows any oral or written statements of the deceased to be admitted. This alternative

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[80] *See generally,* 2 Wigmore § 578; J. Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization,* 4 U.C.L.A. Intra. L. Rev. 175, 212 (1956-57). This is the position taken by the Uniform Rules of Evidence, Rule 63(4)(c) (1953). This section of the Uniform Rules provides "if the declarant is unavailable as a witness," a statement made by the decedent will be admitted as an exception to the hearsay rule where such statement is 'describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action'."

[81] Mont. Rev. Codes Ann. § 93-701-3 (1947) (". . . when it appears to the court that, without the testimony of the witness, injustice will be done."); Ariz. Rev. Stat. Ann. § 12-2251 (1961) (". . . required to testify thereto by the court.").

[82] J. Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization,* 4 U.C.L.A. Intra. L. Rev. 175, 212-13 (1956-57).

[83] N.M. Stat. Ann. ch. 20, §§ 2-5 (1953) provides: ". . . unless such evidence

allows both the interested party and the estate to present their side of the controversy. It is thought that by making the oral and written declarations of the decedent available through an exception to the hearsay rule, that most of the reasons given for the Dead Man Statute are eliminated.[84] It is true that the declarations of the decedent allowed under this exception to the hearsay rule are not subject to cross-examination. But this same criticism can be made concerning any statements admissible through hearsay exceptions.

V. Conclusion and Legislative Proposal

The Dead Man Statute should be repealed. It was conceived as a means to prevent fraud but has served only to cloud the issue. It is a constant source of litigation. Strict application of the statute prevents more honest claims from being established than it prevents dishonest claims. There are more effective ways to prevent perjury than with exclusionary rules.

If the Dead Man Statute is not repealed, then the third alternative discussed above should be enacted. Under this rule the survivor can testify against the decedent's estate, but any oral or written declaration made by the decedent is allowed as an exception to the hearsay rule. A similar rule was recommended in 1938 by the Committee on Improvements in the Law of Evidence of the American Bar Association[85] and is the position taken by the Uniform Rules of Evidence.[86] This rule does not allow the injustice of the Dead Man Statute and gives protection to the estate by allowing declarations of the decedent to be admitted. The wording of such a statute could be as follows:

> In actions, suits, or proceedings by or against the representatives of deceased or insane persons, including proceedings for the

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is corroborated by some other material evidence."; Ore. Rev. Stat. § 44.020 (1953) makes all parties competent witnesses. § 116.555 states in part as follows: "No other claim which has been rejected by the executor or administrator shall be allowed by any court except upon some competent, satisfactory evidence other than the testimony of the claimant."; Va. Code Ann., tit. 8, § 286 (1950) provides in part as follows: [N]o judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony."

[84] C. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule* 63 (4), 6 Wayne L. Rev. 204, 216 (1960).

[85] 63 A.B.A. Rep. 597 (1938).

[86] Uniform Rules of Evidence 63(4)(c) (1953).

probate of will or proceedings in which successors in interest of such persons are parties, any statement of the deceased or insane person while sane, whether oral or written, shall not be excluded as hearsay.[87]

Leon Carl Hagwood

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[87] This recommended statute is found in M. Ladd, *The Dead Man Statute: Some Further Observations And A Legislative Proposal,* 26 Iowa L. Rev. 207, 239 (1940-41). *Compare* Uniform Rules of Evidence, Rule 63(4)(c) (1953).

STUDENT NOTES

Criminal Law-Admissibility of Confessions or Admissions of Accused Obtained During Custodial Interrogation by Non-Police Personnel: Are The Miranda Warnings Required?

Since the landmark case of *Miranda v. Arizona*[1] was decided on June 13, 1966, by the United States Supreme Court, critics have pointed out that it will take years for the Supreme Court to produce a body of case law spelling out all of *Miranda's* implications.[2] It has been suggested that in the meantime state and lower federal courts will rely on each other's decisions in trying to decide cases.[3] The search for case precedent in this area of the law has crossed jurisdictional lines with great intensity, for the state and lower federal courts are faced with the task of making judgments on cases of first impression stemming from *Miranda-like* situations in their jurisdiction. The Supreme Court in *Miranda* found itself in a controversial twilight zone where they hoped to draw the line between the appropriate limits of an accused's rights and the press of other societal interests.[4] It is manifest that when the courts are faced with the task of interpreting *Miranda* in light of the facts of a particular case before them that is perhaps not readily decidable by a plain reading of *Miranda,* then judges will look to each other for assistance.

In *McElroy v. State,*[5] the Mississippi Supreme Court was faced with just such a situation. The defendant was arrested, placed in jail and charged with cattle theft. While the prisoner was in jail, he was visited by his employer, the owner of the stolen cattle, and was interrogated by him without any *Miranda* warnings[6] being given. The prisoner thereupon confessed to his employer and this confession was used against the prisoner at his trial. On appeal, the defendant urged that the confession should have been excluded, because the warnings required by *Miranda* were not given. The Mississippi Supreme Court dismissed this

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[1] 384 U.S. 436 (1966).

[2] Graham, *What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona,* 14 U.C.L.A. Intra. L. Rev. 59, 61 (1967).

[3] *Id.*

[4] *Interrogation for Criminal Defendants—Some Views on Miranda,* 35 Fordham L. Rev. 169, 205 (1966).

[5] 204 So. 2d 463 (Miss. 1967).

[6] "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." 384 U.S. at 444. As Justice Harlan in dissent succintly put it: This amounts to a "four-fold warning": (1) "right to remain silent," (2) "anything he says may be used against him," (3) "right to have present an attorney during the questioning," (4) "if indigent he has a right to a lawyer without charge." 384 U.S. at 504.

argument with the statement "we do not agree,"[7] citing as authority *Schaumberg v. State,*[8] decided three weeks before by the Nevada Supreme Court. *McElroy* is clearly a case in point of a state court's reliance on another state court's decision on a question left open by *Miranda,* namely: should the mandate of *Miranda* be extended by implication[9] to include custodial interrogation attempted by non-police personnel, or should *Miranda* be restricted to its facts, where there was in-custody interrogation by police officers?[10] Obviously, the Mississippi Supreme Court chose to interpret Miranda restrictively, and pronounced the rule in *McElroy* that to render admissible a confession made to a private person by the accused in custody it is not necessary that the warnings required by *Miranda* be given. Put another way, the Mississippi Supreme Court apparently decided in *McElroy* that since *Miranda* dealt *in fact* with in-custody interrogation *by police officers,* the *Miranda* mandate applied *only* to police officers, and that the *Miranda* requirements do not apply if custodial interrogation is attempted by private persons.

Although there are undoubtedly many legal pundits who would probably disagree with the Mississippi Supreme Court's narrow view of

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[7] 204 So. 2d 463, 465: "Appellant urges that, in order to render the confession admissible, although made to a private individual, the warnings required by *Miranda* were necessary. . . . We do not agree. Schaumberg v. State, 432 P.2d 500 (Nev. Sup. Ct., Oct. 11, 1967)."

[8] 432 P.2d. 500 (Nev. 1967).

[9] For example: "[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal— must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. 384 U.S. at 460. [T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. . . . [W]ithout proper safeguards the *process* of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored." 384 U.S. at 467 (emphasis supplied). "[T]his warning [of the right to remain silent] may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that *he is not in the presence of persons acting solely in his interest.*" 384 U.S. at 469 (emphasis supplied).

[10] Referring to Miranda v. Arizona, Vignera v. New York, Westover v. United States, and California v. Stewart (consolidated for decision), the *Miranda* opinion said: "In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney. . . ." 384 U.S. at 445.

Miranda,[11] it is not the purpose of this note to question the necessity, the appropriateness, and the wisdom of the *McElroy* decision, nor for that matter, the good or bad judgment of the United States Supreme Court in deciding *Miranda*, a question which will be long debated no doubt.[12] The purpose of this note is to examine the rule of law pro-

[11] Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39, 60 (1966): "The lack of acceptance of *Escobedo* was perhaps caused as much from its lofty language as from the unique facts which gave rise to its claim. But *Miranda* may run the danger of the other extreme. Black-letter law, specific rules designed to cover the infinite variety of possible human conduct, has for centuries invited ignorance of principle by artful construction conforming to the letter of the law but wholly avoiding its spirit. The spirit of *Miranda* could similarly become obscured." *See also*, Note, *Criminal Law—Confessions—Custodial Interrogation*. 18 W. RES. L. REV. 1777 (1967): "A plain reading of *Miranda v. Arizona* demands that its holding be applied beyond the precise facts found in the case and used to delineate a procedural code which will guide police and courts in the use of a defendant's pre-trial admissions against interest. If this code is not to be emasculated as were the ones announced in *Escobedo v. Illinois* and *McNabb v. United States*, then it must not be limited to the precise facts . . . presented in *Miranda* and the three companion cases which were reversed for lack of warnings."

[12] See especially Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process: Part II: The New Code of Custodial Interrogation*, 38 MISS. L. J. 57 (1967). *See also*, Arthur, *Questioning by the Police Since Miranda*, 4 WILLAMETTE L. J. 105 (1966); Elsen and Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COL. L. REV. 645 (1967); Note, *Miranda v. Arizona: In-Custody Interrogation: An Examination of the New Rules Further Defining the Suspect's Rights*. 71 DICK. L. REV. 116 (1966); Note, *Miranda: The Application of the Fifth Amendment Right Against Self-Incrimination to Confessions—A Change in Approach"*, 16 BUFFALO L. REV. 439 (1967); Note, *Custodial Statements of Criminal Suspects*, 4 WILLAMETTE L. J. 189 (1966). Also, of no small consequence is the controversial passage of the Crime Control Act, Public Law 90-351, 90th Congress, HR 5037, on June 19, 1968. (Published in full in 36 U.S.L.W. 109, Statutes, June 25, 1968). Title II, Admissibility of Confessions (Sec. 3501) purports to overturn the Supreme Court's *Miranda, Mallory v. United States*, 354 U.S. 449 (1957), and U.S. v. Wade, 388 U.S. 218 (1967), decisions on the rights of criminal suspects. There were highly emotional debates during the process of the passage of Title II. The outcome was that the Senate accepted the sections which sought to overturn the *Mallory, Miranda* and *Wade* decisions *as they applied to federal courts and to courts in the District of Columbia. The provisions had no effect on state courts, where the vast majority of criminal trials take place.* (*See Congressional Quarterly*, May 24, 1968, p. 1181.) As the *Congressional Quarterly*, June 7, 1968, put it at page 1433: "The constitutionality of these provisions (purporting to overturn three Supreme Court decisions, including *Miranda*) was almost certain to be tested, but, meanwhile, it was not clear what their effect on police procedures would be." So the controversy surrounding *Miranda* continues its intensity. In summing up for the moment, Minority Leader Gerald Ford's comment during the debates seems indicative of the tenor of the controversy; in support of the provisions mentioned in this footnote, Congressman Ford had this to say: "I refuse to concede that the elected representatives of the American people cannot be the winner in a confrontation with the Supreme Court." (As quoted in *Congressional Quarterly*, June 7, 1968, p. 1434.) Query: Shades of the "Battle over the Supreme Court" in 1937?

nounced by *McElroy* regarding the admissibility of confessions or admissions of accused obtained during custodial interrogation by non-police personnel without the requirement of *Miranda* warnings. It is an effort to demonstrate how the law developed in the state courts on this specific and narrow point, necessitated by the problem the state courts face in filling out the implications and uncertainties of *Miranda* on a case by case basis until further clarification by the United States Supreme Court is forthcoming.

The Landmark Case of *People v. Frank* [13]

In *People v. Frank* the defendant, an employee of a department store, had been detained by a security guard of the store due to suspicion of theft, and interrogated by six security guards, wherein certain statements were made without benefit of any warning concerning her constitutional rights. The security guards were not police officers, but persons privately employed by the store.[14] Defendant contended that under *Miranda,* no suspect may be permitted to give incriminating statements without adequate warning of his rights, and that statements made to the security guards while being detained and questioned by them were inadmissible since the security guards had not warned her of her rights. The court held that security guards of a department store were not required to inform an employee detained on suspicion of theft of her constitutional rights, and that the *Miranda* prohibition against permitting a suspect to give incriminating statements without adequate warning of his constitutional rights does not extend to non-law enforcemen officers.[15] In holding that the *Miranda* guidelines were applicable only when police personnel conducted an interrogation, the court construed *Miranda's* language as militating for this conclusion. The court cited the following relevant excerpts from *Miranda:*

> . . . the circumstances in Miranda are clearly distinguishable from the present case as it deals with certain newly pronounced principles of law, *the burden of which only* ". . . *law enforcement officials must bear* . . ." (384) U.S. p. 481, 86 S. Ct. p. 1631). Again, clearly enunciated by the Court, is the observation that the decision discusses ". . . the relationship of the Fifth Amendment privilege to *police interrogation* . . ." (384 U.S. p. 491, 86 S. Ct. p. 1636). Because ". . . when an individual is taken into custody or otherwise deprived of his freedom by *the authorities* and is subjected to questioning, the privilege against self-incrimination is jeopardized" (384 U.S. p. 478, 86 S. Ct. p. 1630). Counsel has presented none to the court, and we have been unable to find any decision which extends this prohibition to non-law enforcement officers. Further, there is no argument here that the "security guards" were acting for the police or did anything pursuant to their request. . . . Accordingly, we find that the "security guards" herein were under no

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[13] 275 N.Y.S.2d 570 (Sup. Ct. 1966).

[14] *Id.* at 571.

[15] *Id.* at 572-73.

> duty to warn the defendants prior to obtaining any statement from her . . . (Emphasis supplied)[16]

This language is illustrative of the attitude of the *Frank* court with respect to the interpretation of *Miranda*. Certainly the court was intent on reading *Miranda* narrowly on its facts, and not interested in finding implications in *Miranda* that would extend its coverage to persons other than law enforcement officers.[17] This was the crucial aspect of *Frank*.

Six months later, *People v. Williams*,[18] an important case decided in New York, applied the *Frank* rationale. In this case, a codefendant was arrested for stealing merchandise by a security guard employed by Sears Roebuck and Company. She was accompanied by two security guards to the security office in the basement of the store. She was asked by one of the security guards to make out a "Record of Interview Form" in her own writing. She made out the form.[19] She contended that the statement obtained by the security guards at the time of her arrest and interrogation was inadmissible since she was never notified of her constitutional rights to remain silent or to counsel by the arrestor, citing *Miranda*.[20] The court held that the arrestor here was not a peace officer but a security guard privately employed, and that private persons after making an arrest are under no duty to warn the defendant prior to obtaining any statement from them, citing from *People v. Frank*.[21]

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[16] *Id.* at 572.

[17] *See, supra* note 9. Yet note the *Frank* court's language quoted in the text of this note: ". . . [F]urther, there is no argument here that the security guards were acting for the police or did anything pursuant to their request." Query: Perhaps "foolish consistencies are the hobgoblin of little minds;" but isn't the *Frank* court restricting *Miranda* to its facts on the one hand, and with the other using this expansive language which leaves open the possibility of requiring the *Miranda* warnings to be given by non-police personnel "acting for the police" or doing "anything pursuant to their request?"

[18] 281 N.Y.S.2d 251 (Syracuse City Ct. 1967).

[19] *Id.* at 253.

[20] *Id.* at 255.

[21] *Id.* at 255. ". . . The *Miranda* decision . . . discusses the relationship of the Fifth Amendment privilege to *police* interrogation. (court's emphasis). It is during this custodial interrogation that the privilege against self-incrimination is jeopardized. This court has been unable to find any Federal or state decisions which extend this prohibition to non-law enforcement officers. The cases hold that private persons after making an arrest are under no duty to warn the Defendant prior to obtaining any statement from them. *People v. Frank*, 275 N.Y.S.2d 570 . . . ."

It is interesting to note the *Williams* court's reliance on the words from *Miranda* seized upon by *Frank*. At this point in the development of the law on custodial interrogation by private persons, the *Williams* court could have found words of implication to the contrary in *Miranda* and held the other way. But it apparently did not choose to do so. By following *Frank*, case precedent in New York began to take a rather firm position on this point of law. However, there is language in the *Williams* opinion that can be construed to militate for applying the *Miranda* mandate to private persons. As an afterthought to its holdings, the *Williams* court said this, at 256: "[A] . . . statement was taken without advising the

The Landmark Case of *Schaumberg v. State* [22]

Frank came of age cross-jurisdictionally less than a year after it was decided when Judge Zenoff of the Nevada Supreme Court reached across jurisdictional bounds to New York and used *Frank* as prime authority for deciding a similar *Miranda-like* case confronting the Nevada Court. Due to the force of Judge Zenoff's opinion, and to the fact that he utilized a compilation of other authorities from different jurisdictions in addition to *Frank* to buttress his position, *Schaumberg* became (as this note will proceed to indicate) a landmark case cited as authority by other jurisdictions.[23]

In *Schaumberg,* defendants Schaumberg and Cox appealed from their conviction for the crime of conspiracy to cheat and defraud Harrah's Club at Lake Tahoe in the sum of five thousand dollars by placing a false jackpot on a slot machine. Schaumberg was a slot machine repairman employed at Harrah's. Early one morning Schaumberg was observed working on a dollar slot machine by one Fritz, a pit boss of Harrah's. Schaumberg fixed the machine so that it was turned partially on the base plate and then left the area. Cox, his brother-in-law, then went to the machine and moved it squarely on the base plate and it registered a jackpot. Fritz reported this to two other supervisors. Together with a security guard employed by Harrah's they asked Cox to accompany them to the security office. Leaving him there, they proceeded to find Schaumberg, who was in a washroom. Schaumberg went with them to the manager's office. The security guard remained outside the office while two of the supervisors questioned Schaumberg. In all, four supervisors testified Schaumberg admitted that he had rigged the slot machine. On appeal to the Supreme Court of Nevada, the focal issue was whether the substance of *Escobedo v. State of Illinois*[24] and

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defendant of her constitutional rights. These acts would have been condemned by this Court if the arrest was made by a peace officer, but because the arrestor was a private person the law condones them. In the landmark *Miranda* case . . . the Court said, [384 U.S. at 460, 86 S.Ct. at 1620]: 'the government seeking to punish an individual [should] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.' . . . [T]his Court thinks it is a dangerous policy to allow [private persons] to play the role of policeman. . . . Any . . . statements to be taken can be more effectively accomplished by the professional policeman trained to do these things. I [sic] seems ludicrous to say that a District Attorney in prosecuting a defendant cannot use evidence obtained by a policeman in derogation of a Defendant's constitutional rights, but can use this same evidence obtained by a private person in derogation of a Defendant's constitutional rights which in turn is handed over to a policeman who then hands it over to a District Attorney. As Judges Brandeis and Holmes said in their dissent in the *Burdeau v. McDowell* case, 256 U.S. 465, 477 (1921): 'Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.'"

[22] 432 P.2d 500 (Nev. 1967).

[23] The Mississippi Supreme Court relied completely on *Schaumberg* for authority in *McElroy, supra* note 7.

[24] 378 U.S. 478 (1964).

the admonitions of *Miranda* apply when confessions or admissions otherwise admissible are given to persons who are not officers of the law nor their agents. The Nevada Supreme Curt held they did not.[25]

The significance of *Schaumberg* is not only that it reinforced the proposition elaborated in *Frank*, but that it also faced squarely what must have been a strong argument by defense counsel that defendants were placed in a position by the supervisors that smacked overwhelmingly of the "potentiality for compulsion"[26] that *Miranda* sought to obviate. Judge Zenoff dismissed this defense argument by interpreting *Miranda* to obviate only those "potentiality for compulsion" settings found in custodial interrogation *initiated by police officers.*[27]

The Post-*Frank* and Post-*Schaumberg* Trend of Decision

The cases reported on custodial interrogation by non-police personnel since both *Frank* and *Schaumberg* indicate that these two landmark cases are the chief authorities relied upon by other State Judges on this point of law. The vitality of these two decisions seems to be growing. Of

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[25] 432 P.2d 500, 501.

[26] 384 U.S. at 457.

[27] 432 P.2d at 501. Judge Zenoff reasoned as follows: "The purport of *Escobedo* and *Miranda* is to prevent oppressive police tactics which violate individual rights and produce involuntary confessions. Though *Miranda* said there can be no doubt that the Fifth Amendment privilege is available to protect persons from being compelled to incriminate themselves in all settings in which their freedom of action is curtailed, it is clear that *the thrust of the decision was aimed against the 'potentiality for compulsion' . . . found in custodial interrogation initiated by police officers.*" (emphasis supplied). The Judge then cited for this proposition People v. Frank. Other authorities cited by Judge Zenoff for this proposition that bear attention are People v. Santiago, 278 N.Y.S.2d 260 (1967); People v. Crabtree, 49 Cal. Rptr. 285 (1966); People v. Wright, 57 Cal. Rptr. 781 (1967); People v. Hays, 58 Cal. Rptr. 241 (1967); State v. O'Kelly, 150 N.W.2d 117 (Neb. 1967); and Ibsen v. State, 422 P.2d 543 (Nev. 1967).

In People v. Santiago, the New York Court held that evidence seized by privately employed security guards in a physical search of defendant made incident to lawful arrest of defendant for shoplifting was admissible. The court pointed out the distinction between "peace officers" or persons "acting under governmental authority" and nongovernmental personnel, stressing that alleged illegal searches made by a nongovernmental agent are not in derogation of a defendant's constitutional rights against unreasonable searches and seizures, and pointing out through recent decisions the vitality of the holding in Burdeau v. McDowell, 256 U.S. 465, that the Fourth Amendment protection against unlawful searches and seizures applied only to governmental action, under the rationale that the origin and history of the Fourth Amendment clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. People v. Frank was cited by analogy in *Santiago*, suggesting that the *Frank* holding that the protections of *Miranda* should be restricted to police action, as opposed to questioning by private persons, reinforces the decision in *Santiago*, and vice-versa. One law review commentator suggests that "[o]ther hold-

ings restricting *Miranda* to police action, as opposed to questioning by private persons, may be anticipated by analogy to the decisions which hold that, under the Fourth Amendment, items of evidence are not barred from admission because illegally taken by individuals holding no governmental office." 4 Willamette L. J. 105, 127 (1966).

In People v. Crabtree, a pre-*Miranda*, post-*Escobedo* decision, the California court held that inquiry made by a food store security agent, who was a private citizen, and who placed defendant under arrest for theft, as to why defendant had not paid for meat procured at store was not within rule that statements made by defendant are inadmissible when elicited under circumstances showing that authorities carried out process of interrogation lending itself to eliciting incriminating statements. Defendant had contended that the statement he made to the security agent after he had been taken into custody was inadmissible under *Escobedo*. The court rejected this contention on the ground that the inquiry made by the security agent was not within the *Escobedo* rule since he was a private citizen.

In People v. Wright, the California court held that a security guard employed by a county general hospital, owned and operated by a governmental agency, is not a member of the "authorities" who must have advised a suspect of his constitutional rights before an incriminating statement by the suspect may be admitted in evidence. The court assumed that had the security guard been a peace officer, a warning would have had to be given. The court reasoned that *Miranda* did not purport to catalogue the persons who must give the respective warnings prescribed therein; that *Miranda* involved four separate cases in each of which the interrogating officers were policemen; that *Miranda* speaks variously of "law enforcement agency", "law enforcement officer", "police interrogation procedures", "police", and "authorities"; that private persons who convey incriminating statements to the prosecution are not included in the term "authorities",' that the defense had presented no case, and none could be found, where the interrogator was not the agent of a governmental department, the very function of which was to enforce the law. Therefore the security guard here, who was not employed by an agency of government whose primary mission is to enforce the law, did not have to give the *Miranda* warnings to a suspect before an incriminating statement by the suspect may be admitted in evidence.

In People v. Hays, the California court held that fact that police officer contacted defendant's alleged girl friend and arranged her meeting with defendant at city jail lineup room did not constitute a process of interrogation lending itself to eliciting statements from defendant with danger of coercion, where officer neither sent girl friend to elicit statements nor discussed with her what to say. Because statements by girl friend and defendant were voluntary, and police did not directly or subtly influence defendant's statements, electronic recording of conversations was admissible. The defendant contended that he should have been warned of his right to appointed counsel in light of *Miranda*, but the court pointed out that the trial occurred in March, 1966, and that this warning applies only in cases in which trial begins after June 13, 1966; the date of the *Miranda* decision. When defendant further asserted that he should have been advised of his constitutional rights under *Escobedo* at the time the conversation between him and his girl friend was recorded, the court said that a warning is not required unless the police are engaged in a process of interrogation lending itself to eliciting incriminating statements, because warnings are designed to prevent the use of coercive practices to extort confessions

the two decisions, *Schaumberg* currently seems to be the preferred, suggesting perhaps that Judge Zenoff's precise dismissal of the "potentiality for compulsion" argument[28] suited the task of the various judges in overcoming defense reliance on Miranda. There is little doubt that the rationale of *Frank* is absorbed in the Schaumberg rationale, so conceivably citing *Schaumberg* is a convenient way to cite both decisions. At any rate, as we have seen, *Schaumberg* alone was cited by the Mis-

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or other incriminating statements, and not to protect a defendant from revealing evidence against himself in other ways, such as here where defendant made statements to his girl friend.

In State v. O'Kelly, the Nebraska Supreme Court held that testimony by a university criminology professor (who had filed charging defendant with homicide and who had made the visit on his own accord because he was interested in motivation of murderers) as to defendant's confession to him was admissible even though confession was made in absence of defendant's counsel. The court reasoned that no participation by the State was involved in obtaining the confession by the professor, even though the State had permitted the meeting; that there was no official influence upon the defendant to confess; that the professor's purpose in visiting defendant was not known to the police; and therefore the confession obtained by the professor was admissible. This decision was based on an appeal from a post-conviction motion that was overruled by the trial court without an evidentiary hearing. The principal ground of the motion was violation of defendant's right to counsel at the time of the confession. Since the confession was obtained on August 20, 1962, and presumably the trial occurred soon thereafter, apparently neither the protection of *Escobedo* (1964) or *Miranda* (1966) were available at the time of trial nor on the direct appeal which transpired November 1, 1963. What the Nebraska Supreme Court would have ruled if the confession had been obtained after the *Escobedo* and *Miranda* decisions under the same circumstances is speculative. The fact that Judge Zenoff cited this case is indicative of his apparent intent to utilize for precedent even pre-*Miranda* decisions that militated for a strict construction of the rights of the accused not withstanding *Miranda's* apparent thrust to broaden the rights of the accused in custody. Of course, Judge Zenoff viewed *Miranda* factually distinguishable since in *O'Kelly* as in *Schaumberg*, custodial interrogation was conducted by non-police personnel, whereas *Miranda's* thrust was at police interrogation.

In Ibsen v. State, a prior decision by Judge Zenoff, the Nevada Supreme Court held that the testimony of two cell-mates of defendant was admissible where the record supported the conclusion that the cell-mates acted independently of any agency relationship with law officials; and while they were encouraged to learn what information they could from defendant and were later rewarded for their success, they were unrelated to the State except as informers. It is interesting to note here that it would seem that the words in the *Frank* case, "further there is no argument here that the 'security guards' were *acting for the police or did anything pursuant to their request . . .*" 275 N.Y.S.2d at 573, are inconsistent with the fact situation in *Ibsen*. (emphasis supplied). Apparently Judge Zenoff recognized that the question of using informers to interrogate raised one more knotty problem he did not wish to specifically deal with in his opinion. See 14 U.C.L.A. INTRA. L. REV. 59, 90; 55 CALIF. L. REV. 337, 358; 49 MINN. L. REV. 47.

[28] *See* notes 26 and 27.

sissippi Supreme Court in *McElroy*,[29] and recently the Alabama Supreme Court cited *Schaumberg* alone in *Truex v. State*.[30] The Iowa Supreme Court relied on *Frank* in a case[31] confronting it one week before *McElroy* was decided in Mississippi relying on *Schaumberg*. The State Supreme Courts of Louisiana,[32] Kansas,[33] and Indiana[34] in recent months have based important decisions on the *Frank-Schaumberg* precedent.

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[29] *See* note 23.

[30] 210 So.2d 424 (Ala. 1968). In holding that the testimony of a witness, who was the sister of decedent, to the effect defendant led her to the deceased and admitted the killing, was not inadmissible because she did not apprise defendant of his *Miranda* rights. The Alabama court said, at 425: "We are constrained to agree with the Supreme Court of Nevada that the substance of *Escobedo* . . . and . . . *Miranda* . . . have no application when confessions or admissions otherwise admissible are given to persons who are not officers of the law nor their agents. *Schaumberg v. State*. . . ."

[31] State v. Masters, 154 N.W.2d 133 (Iowa 1967). This was a shoplifting case in which the Iowa Supreme Court stated that statements made by defendant to store employees when she was stopped by such employees and asked if she had not taken items for which she had not paid were admissible, the court reasoning that there was no police or custodial interrogation under the circumstances, thereby rendering *Miranda* inapplicable. (citing *Frank*.)

[32] State v. Rodgers, 207 So.2d 755 (La. 1968). In this case thefts of mental and material from a corporation was under investigation by the Bogalusa police and other police officers from another town; one Simmons, yard foreman of the corporation, who was present for the purpose of identifying the property, was in the yard of a scrap metal company in New Orleans when the defendant drove into the yard with corporation property in the back of his pick-up truck. After defendant sold it, the police arrested him. The defendant was permitted to drive his truck back to Bogulasa, and at his request, Simmons accompanied him, the officers following in a separate car. Inculpatory statements were made to Simmons during this ride which were admitted at the trial. On appeal, the defendant contended that the statements were inadmissible under *Miranda*, since no *Miranda* warning had preceded his statements. The court held that although defendant was under arrest, the statements to Simmons were not inadmissible under the *Miranda* rule. The court referred in its holding to other "landmark cases", citing *Frank* and *Schaumberg*.

[33] State v. Little, 439 P.2d 387 (Kan. 1968). The Kansas Supreme Court held in this case that an affirmative answer by defendant in reply to a question of a gift shop owner, as to whether he was the one who had given her a forged check in payment for a watch, although made in the presence of a law enforcement officer, did not stem from "custodial interrogation", so that its admissibility into evidence was not subject to requirements set forth in *Miranda*. The Kansas court utilized *Schaumberg* in buttressing its holding. The fact differential in *Little* represented by the presence of a police officer at the time the private person, the gift shop owner, asked defendant the crucial question, seemed to have no bearing on the Kansas court in using *Schaumberg*, which in effect illustrates the broadening of the scope of the *Schaumberg* rationale as the *Miranda* rationale seems to be evermore narrowed by state courts.

[34] Leaver v. State, 237 N.E.2d 368 (Ind. 1968). In this case the Indiana Supreme Court held that a written communication by the accused to a female

It would seem then that the trend of decision predictably will continue in the direction of restricting the *Miranda* warnings requirement as a condition precedent to the admissibility of confessions or admissions of accused obtained during custodial interrogation to the police. This writer is unable to report any change on the State court decisional level from the condition of the case law at the time of *Frank* when the court stated that "Counsel has presented none to the Court, and we have been unable to find any decision which extends this prohibition to non-law enforcement officers."[35]

The State courts apparently are content with the *Frank-Schaumberg* rationale, and will predictably continue to apply it until further clarification from the United States Supreme Court on this point of law is forthcoming.[36]

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prisoner which used the phrase "I am guilty" was receivable in evidence without showing compliance with *Miranda* in view of the fact the statement had not been given to a law officer. The court said at page 371: "There has been no precedent in Indiana in this regard. There is, however, a recent case of *Schaumberg* . . . arising in the State of Nevada." The court then went on to its holding consistent with the *Schaumberg* rationale that statements given to persons who are not officers of the law are not within the *Miranda* mandate.

[35] 275 N.Y.S.2d at 572.

[36] It would seem from the recent case of Mathis v. United States, 88 S. Ct. 1503, decided by the Supreme Court on May 6, 1968, that the Court may eventually decide this question. In *Mathis*, defendant was convicted before the United States District Court for the Southern District of Florida of knowingly filing false claims for income tax refunds. Defendant contended that a part of the evidence on which the Government's case rested consisted of documents and oral statements obtained from defendant by a government agent (Internal Revenue Service agent) while defendant was in jail serving a state sentence, and that since the IRS agent did not give defendant the *Miranda* warnings, the statements made by the defendant to the agent were inadmissible. The defendant relied exclusively on *Miranda* for this contention. The District Court rejected this contention as did the Court of Appeals in affirming. The U.S. Supreme Court granted certiorari to decide whether the *Miranda* case called for reversal. The Supreme Court held that it did. So now a defendant incarcerated in a state jail is entitled to be given *Miranda* warnings before interrogation by internal revenue agents. Although this Supreme Court decision is limited to the specific fact situation of IRS Tax interrogation, it indicates the direction the Supreme Court is moving, which is away from "police" interrogation to include nonpolice personnel, although concededly an IRS agent can be construed to be someone other than a private person since he is a person who is part of the governmental system. However, there is language in the opinion by Justice Black which may foreshadow the direction the Court will move if and when it confronts the police-private person dichotomy of the *Frank-Schumberg* rationale. At page 1505, Justice Black remarks:

"The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is 'in custody' in connection with the very case under investigation. *There is no substance to such a distinction, and in effect it goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing*

Conclusion

It is hoped that this discussion of the rule of law pronounced applicable to Mississippi by *McElroy*—that confessions or admissions of accused obtained during custodial interrogation by non-police personnel need not be predicated on the *Miranda* warnings—will serve to give not only some insight into how the law developed on this point not expressly decided by *Miranda*, but also a bird's-eye view of the law-shaping power and responsibility of the justices sitting on the highest benches of our state court system. The formulation of constitutional principles with regard to law enforcement, with its attendant balancing of effective enforcement of the law with adequate protection of the rights of the accused, is a constant responsibility not only of the United States Supreme Court, but also of the highest courts of the fifty states. Under a government of laws in our Republic, we depend to a great extent upon an independent judiciary for the protection of our constitutional rights. If it would seem that in the development of the law on the narrow point discussed in this note the state courts have been unwilling to follow *by implication* the lead of the Supreme Court of the United States, then perhaps we should ask ourselves not simply *whether* or not the state courts are patently ignoring the spirit of *Miranda*, but *why* they are doing so. Query: Can we agree on the proposition that in a Republic such as ours, it is all to the good that case law development is the monopoly of no one system of courts, but is rather a joint venture of the state and federal systems in the monumentally difficult task of translating high level ideals and abstractions into understandable and meaningful terms?

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in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reasons why the person is in custody. In speaking of 'custody' the language of the *Miranda* opinion is clear and unequivocal: 'To summarize we hold that when an individual is taken into custody, or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is in jeopardy. 384 U.S., at 479, 86 S. Ct. at 1630.'" (emphasis supplied).

Query: Is there anything in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by *non-police personnel,* i.e. private persons? One can see how the accent can be shifted on *who* interrogates re implications in *Miranda,* just as the accent in *Mathis* was on *why* the person is in custody. The U.S. Supreme Court could without too much difficulty, given its premise in *Miranda* that certain warnings be given a prisoner in custody before he can be interrogated, find the private person-police dichotomy a distinction without a difference in light of *Miranda's* design to give "meaningful protection to Fifth Amendment rights" as Justice Black put it in *Mathis.*

Wage Garnishment—The Contemporary Shylock's Pound of Flesh

I. History

Since time immemorial disgruntled creditors have been pursuing their debtors much as hounds after the fox. Even in Biblical times, indebtedness was a problem.[1]

Although the earliest methods used by creditors to obtain satisfaction of debts appeared to be sufficient, nevertheless these creditors, in an effort to appease their insatiable economic appetites, felt it necessary to originate new ways to reach debtors. Such efforts by creditors gave rise to many changes in the area of the law of debtor-creditor relationships.

As is often the case, however, the snail's pace of the changing common law proved a bit slow for anxious and aggressive creditors. In an effort to meet the demands of these insistent creditors, legislators enacted *statutory* remedies allowing creditors to reach the assets of a debtor in the hands of a third party in order to satisfy the indebtedness, —and thus, the remedy of garnishment had its inception.

The garnishment remedy, which is purely statutory, is traceable to the Middle Ages where it originated as the offspring of "foreign attachment," a process designed to provide an action against non-resident merchants.[2] The remedy of "foreign attachment" was well-developed in the medieval boroughs of England, and later spread to colonial America, where it served as the basis for early garnishment legislation.[3]

Since garnishment was an outgrowth of attachment, the two actions are quite similar in nature. However, there are certain technical distinctions between the two. The essential distinction is that attachment relates to the rights of a creditor in property possessed by his debtor, whereas garnishment relates to the rights of a creditor with respect to property of the debtor in the hands of a third party.[4] Practically speaking, however, the two terms are frequently used interchangeably.

It is important to note that the garnishment of a third person was originally the method used merely to execute an attachment of a debtor's assets held by a third party. At that time the creditor had no direct recourse against the third party. The third party simply was required to hold the goods pending adjudication of the creditor's claim against the debtor. Only later, as the metamorphosis of the specific remedy of garnishment became more complete, did the action evolve into a separate process providing a creditor with direct action against the third party.[5]

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[1] *Matthew* 18:24-34 (King James). *See also,* 1 Montesquieu, Spirit of Laws 294 (5th ed. 1773); M. Radin, Roman Law 49, 263, 314-317 (1927); 2 Pollock & Maitland, The History of English Law 596 (2d ed. 1889).

[2] Holdsworth, A History of English Law 387 (3rd ed. 1923).

[3] Md. Laws ch. 40, § 7 (1715); Md. Code Ann. art. 26, § 21, repealed by art. 399, § 1 (1957); art. 9, § 29 (1951), repealed by art. 399, § 1 (1957).

[4] 6 Am. Jur. 2d *Attachment & Garnishment* § 3 (1963).

[5] Mussman and Riesenfeld, *Garnishment and Bankruptcy,* 27 Minn. L. Rev. 1, 17 (1942).

The garnishment process is used today primarily against an employer holding unpaid wages of an employee-debtor. Although property of a debtor other than wages is frequently vulnerable to the garnishment process, such property is not within the scope of this discussion.

Three parties are involved in a garnishment proceeding: the creditor, usually referred to as the plaintiff; the employee-debtor, referred to as the defendant; and the employer, referred to as the garnishee. Although the relationship and principles involved are substantially the same, the garnishment remedy is sometimes called by other names, such as "wage deduction procedure,"[6] "income execution,"[7] and "trustee process."[8]

The basic purpose of wage garnishment is twofold: first, when wages are garnished by a creditor prior to judgment, the purpose is to provide security in case of judgment being rendered against the employee; and, second, once judgment is rendered, to make the employer responsible to the creditor, rather than to the employee, for part of the employee's wages.[9]

Little did the lawmakers of medieval England realize that the wage garnishment remedy described above would derive from the legal right which they had vested in creditors for the purpose of attacking a nonresident merchant's assets held by a third party. The modern wage garnishment process provided by lawmakers is a far cry from the medieval remedy of "foreign attachment." Quite different policies, objectives, and socio-economic factors influenced the passage of the medieval legislation as opposed to the factors which should be considered in the enactment or amendment of contemporary garnishment legislation.[10] However, as the history of wage garnishment legislation indicates, the evolution of legal techniques for settlement of debtor-creditor problems as a whole has been haphazard.[11] As a consequence, the problem of finding successful, workable legislation for wage garnishment still remains with us.

The enactment by Congress of the Consumer Credit Protection Act,[12] better known as the Truth in Lending Act, on May 29, 1968, further necessitates the need for immediate reanalysis of existing wage garnishment legislation by the various states. The garnishment provisions of this Act become effective July 1, 1970. Several of these provisions make sweeping changes in this area of the law. Therefore, state legislators should look anew at their present garnishment legislation to see if statutory changes are needed to prevent possible state-federal conflicts.

In order to propose changes and suggestions which hopefully will result in more satisfactory results in this area of the law, it is necessary

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[6] ILL. ANN. STAT. ch. 62 § 71 (Smith-Hurd, Supp. 1967).

[7] N.Y. CIV. PRAC. § 5231 (1963).

[8] N. H. REV. STAT. ANN. ch. 512 (1955).

[9] HANDBOOK ON ASSIGNMENT AND GARNISHMENT OF WAGES 27 (Commerce Clearing House 1966) [hereinafter cited as HANDBOOK].

[10] J. Cover, *Consumer Credit and Individual Bankruptcy*, 196 ANNALS 92 (1938).

[11] H. Oleck, DEBTOR CREDITOR LAW 2 (1953).

[12] CONSUMER CREDIT PROTECTION ACT, 36 U.S.L.W. 47, Pub. L. No. 90-321 (May 29, 1968).

to do three things: first, to establish the rationale of wage garnishment in terms of what it seeks to do; second, to set forth the basic economic and social policies and problems which must be considered in fashioning better garnishment legislation; and, third, to analyze existing legislation in an attempt to determine the reasons for its ineffectiveness and shortcomings, along with evaluating proposed changes, so as to determine the legislation most likely to achieve its objectives.

II. Rationale

In order to determine the *raison d'etre* of wage garnishment, we must examine two basic principles involved in any indebtedness. The first principle is that when one receives goods, services, and the like, he assumes an obligation of payment. The second principle is that upon the individual's failure to satisfy this obligation, the person to whom he is indebted has the right to proceed against his debtor to collect the debt.

It is this second principle which gives rise to the remedy of wage garnishment. In order to achieve the fundamental aim of garnishment, it is necessary to bring a third party into the principal debtor-creditor relationship. Thus, in merry old England, when a foreign merchant became indebted to one of the local folk, a local merchant having goods belonging to the foreign merchant was susceptible to "foreign attachment." And, similarly, though quite a bit later, when an employee in America became indebted to one of the townspeople, the debtor's employer was brought into the wage garnishment process.

At first, it is difficult to see how such simple concepts as those outlined above could result in the vast and frequently complex problems which exist today in the debtor-creditor relationship. Such has been the history of the law, however, in most every field of its development. All too often problem areas in the law have been viewed much too simply, and legal remedies created too swiftly, with inadequate consideration being given to all the economically and socially desirable factors sought to be attained by legislative maneuvering.

With this observation in mind, it would be unwise to view the garnishment remedy with over-simplification. Many of the problems concerning wage garnishment lurk beneath the surface of the remedy, where frequently they have remained, unseen and unconsidered.

The reason is clear enough why some of these problems were not considered and dealt with before by early lawmakers enacting garnishment statutes—the problems simply did not exist because of the differing social and economic conditions existing then as compared with those conditions existing now. The evolution of these conditions has resulted in new and different problems for debtors and creditors alike. Therefore, it is necessary to study these changed conditions and problems in order to gain some insight into the failure of wage garnishment legislation to achieve its objectives.

Although these socio-economic changes are interrelated, for purposes of analysis it is helpful to study separately certain facets of the changes. Therefore, the subsequent discussion treats individually the following three developments: the change in the composition of the national work force, the change in the social attitude toward indebted-

ness, and the burgeoning of consumer credit.

A. *Change in Composition of National Work Force*

Since wage garnishment is an action against an employee and his employer, it is only logical that an increase in the number of people composing the work force to the status of employee produces a larger group against whom the remedy of wage garnishment is available. In the United States, the rise in percentage of workers to employee status has been comparatively rapid. One indication of this rise is the change-over of the country from an agrarian to an industrial economy.

The following statistics are evidence of this change-over. In 1860, approximately 59% of the American work force was agricultural and 41% non-agricultural.[13] At the turn of the century, the percentage of agricultural workers dwindled to 37% and non-agricultural laborers rose 63%.[14] By 1947, the percentage of agricultural workers dropped to 14% and non-agricultural workers rose to 86%.[15] In 1967, only 5% of the national labor force was agricultural, whereas 95% was non-agricultural.[16]

The increase in the ratio of non-agricultural workers to agricultural workers shown by these figures does not necessarily mean that the number of people of employee status increased in direct proportion to the increase in non-agricultural workers. For example, a boy who left the farm and went into business for himself, or with others, would be included in the non-agricultural group and yet not be an employee in the pure sense of the word. It is reasonable to conclude, however, that a substantial number of those individuals included in the non-agricultural group did become employees.

In addition to the increase in the ratio of non-agricultural workers to agricultural workers, a further indication of the growing number of wage-earners is the strong labor movement which began in the post Civil War years.[17]

With this vast increase in the number of people of employee status, the stage was set for the creditor to make wholesale use of wage garnishment as a collection device. The only problem was that the legislation providing this remedy had failed to account for the sizeable change in the work force. As a result, the increased use of wage garnishment by creditors created new and considerable problems. These problems will be discussed after looking at two other important factors—a change in the social attitude toward indebtedness and the tremendous growth of consumer credit, both of which helped produce the problems.

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[13] Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957, 74 (1960).

[14] *Id.*

[15] Bureau of the Census, Statistical Abstract of the U.S. 221 (88th ed. 1967).

[16] *Id.*

[17] A. Cox, Cases on Labor Law, 9-11 (4th ed. 1958).

B. *Change in the Social Attitude Toward Indebtedness*

The second aspect of changing conditions deserving scrutiny because of its relation to garnishment legislation is that of the social attitude toward indebtedness. Consideration of this changing social attitude is important because of the economic effects which it produced. Actually, whether the change in attitude produced the closely related economic change, or vice-versa, is a question akin to the problem of the chicken and the egg. Which came first, however, is really unimportant for our purposes, so long as the result of the changes is noted.

Indebtedness during colonial days was held in great disfavor and even carried with it a moral stigma. It was not uncommon for a debtor to spend a day in the pillory on public display, or even to be incarcerated in a debtor's prison for inability to pay his debts.[18]

Slowly but surely, however, these punishments vanished, and the moral stigma of indebtedness was replaced with reluctant social acceptance. As is typical of social attitudes, when the number of debtors began to increase substantially, the attitude toward debt continued to change. Eventually indebtedness became a socially acceptable fact of life.[19]

The next logical step in the evolution of the attitude toward debt was the actual encouragement of indebtedness by the business community. This encouragement assumed the form of consumer credit, which is the third and final socio-economic development to receive analysis.

C. *Development of Consumer Credit*

Today in the United States, consumer credit is a fact of life.[20] Indeed, the family, which once was the exception because it bought goods or credit, has now become the rule. As one author puts it, "The middle class had adopted the pattern of consumer credit from the poor and made it part of the American way of life."[21] One indication of the tremendous overall growth of consumer credit is the high rate of consumer *installment* credit. After reaching a high of 740 million dollars in April, 1965, installment credit fell off to a low of 190 million dollars in May, 1967. The rate of credit is once again on the upswing, however, as evidenced by the increase beginning in late 1967 and continuing into 1968.[22]

Paralleling the rise in consumer installment credit has been the corresponding rise in consumer installment debt. In 1948, the installment

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[18] J. H. Smith, Colonial Justice in Western Massachusetts 150, 189 (1961).

[19] P. Douglas, *Foreword to Consumer Credit*, 196 Annals at xi (1938); Haring, Installment Credit Comes of Age 5 (1943); Margolius, A Guide to Consumer Credit 1 (1963).

[20] Caplovitz, The Poor Pay More 1 (1967).

[21] *Id.*

[22] Wall Street Journal, February 28, 1968, at 1, col. 4.

debt was 2.5 billion dollars;[23] in 1955, it was 29 billion dollars;[24] in 1965, it was 66 billion dollars;[25] and in mid-1967, it was 75 billion dollars.[26] Provided the rising installment debt continues at this same pace, it is estimated that in 1970 the debt will approach 100 billion dollars.[27]

For our purposes the importance of the upsurge in installment debt is the possibly related increase in the number of wage garnishments executed. Two recent surveys are indicative of the trend. In California, a survey of 100 San Francisco Municipal Court cases showed that these cases produced a total of 68 levies of one kind of another, with at least 4% of them wage garnishments.[28] Moreover, during the first two months of 1965, the San Francisco Sheriff's Office made more than 5,900 services, including 3,700 levies under writs of attachment and execution.[29] The San Francisco Chief Deputy estimated that 75 to 80% of these levies were wage garnishments.[30] In Chicago, Illinois, the number of wage garnishments increased from 59,000 in 1962 to 73,000 in 1966.[31]

Although these statistics certainly are not conclusive proof that wage garnishments have increased because of the increase in consumer credit,[32] there is a strong presumption that the two increases are more than coincidental. The presumption is logical simply because an increase in credit results in an increase in debt.

Statistical evidence of the relationship between the increase in consumer credit and wage garnishments is the California survey which shows that purchases on credit and hospital or medical bills are the main sources of suits giving rise to wage garnishment.[33] Also, an analysis of two other garnishment surveys, one of the surveys consisting of garnishments of industrial employees working in various parts of the country, and the other survey consisting of garnishments of New York City employees, shows that about one-half of the garnishments grew out of defaults on installment purchases.[34]

The California survey points out the interesting fact that collection agencies are the most frequent users of the wage garnishment remedy.[35] In defending the use of this remedy, these collection agencies argue that the garnishments are essential to the economy because current earnings are often the only asset of a debtor which is reachable by creditors.

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[23] CAPLOVITZ, FOREWORD to THE POOR PAY MORE at xvi (1967).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965).

[29] *Id.*

[30] *Id.*

[31] CAPLOVITZ, *supra* note 23 at xviii.

[32] There appears to be very little statistical data available with respect to the relation of wage garnishment laws to consumer credit. *See*, CHAPMAN, THE CONSUMER FINANCE INDUSTRY 139 (1967).

[33] BRUNN, *supra* note 28 at 1239.

[34] R. COX, THE ECONOMICS OF INSTALLMENT BUYING 267 (1948).

[35] BRUNN, *supra* note 28 at 1240.

Without the availability of wage garnishment, so the argument goes, fewer debts would be collected with a resulting drop in consumer credit. This drop in credit would adversely affect the economy as well as those people who could no longer get credit.

It seems, however, that this predicted drop in credit might not be so damaging after all. If merchants began to be a little more discreet in extending credit to their customers, fewer debts would arise, and quite probably, garnishments and their attendant economic ills would decrease. Of course, in the event the debts decreased, the business of collection agencies might tend to become a bit slack, which just possibly indicates the truer reason why the agencies deem the garnishment remedy so necessary.

At any rate, the California survey challenges the accuracy of this prediction of consumer credit lag made by the collection agencies. According to the survey, whether a wage garnishment statute is either more favorable or less favorable to the creditor does not influence the extension of consumer credit.[36] This conclusion was based on an analysis of states with varying wage garnishment laws by comparing the volume of retail sales and installment credit in these states with the personal per capita income. The survey showed, for example, that Florida, which exempts 100% of a person's wages, (provided he is the "head of a household") ranks highest in personal per capita income among the Southeastern states, whereas, Mississippi, which at the time of the survey allowed low exemptions, ranks lowest in per capita income.[37]

Since there is very little wage garnishment in Florida where per capita income is comparatively high, and considerable garnishment in Mississippi where per capita income is low, it appears that the adverse economic effect predicted by collection agencies is inaccurate. However, to conclude from this per capita income data that the extension of consumer credit is unrelated to garnishment laws is fallacious because many factors other than garnishment legislation obviously figure in the determination of per capita income.

In addition to the theoretical defects of failing to consider all of the relevant factors in reaching such a conclusion is the more important practical aspect. In describing the present credit situation in Florida, a practicing Florida attorney states that "a money lender must either receive a mortgage for his trust or rely on the word of his debtor because money judgments are practically uncollectible in this debtor's paradise when the lender relies solely on wages as a source of funds for repayment."[38]

Also, common sense tells us that if the debts are uncollectible, the extension of credit creating these debts is going to be restricted.

Before an authoritative determination can be made of the specific effect of wage garnishment on consumer credit, it is obvious that an intensive study of the relation of the two is necessary. But, in any event, one fact remains certain—any change in wage garnishment legislation

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[36] *Id.* at 1241.

[37] *Id.* at 1242.

[38] La Grone, *Recovery of a Florida Judgement by Garnishing Wages of the Head of a Family*, 17 U. Fla. L. Rev. 196, 198 (1964).

should be in tune with the changing economy, and one important part of the change in the national economy has been the tremendous increase in consumer credit as shown by the growth in the outstanding installment debt.

III.

The failure of lawmakers to properly accommodate wage garnishment legislation with the various socio-economic changes just discussed—composition of the work force, attitude toward debt, and consumer credit—has given rise to several problems. It is necessary to examine these problems in light of the socio-economic changes in order to determine the best method for solving these problems. Once again, a breakdown of these problems into three categories is helpful for analytical purposes. Therefore, attention is now directed to the following problem areas: first, the increasing importance of wage exemption; second, the spiraling rate of personal bankruptcies; and third, the growing rate of employee terminations resulting from wage garnishment.

A. *Wage Exemption*

The first problem of concern, wage exemption, is as old as the garnishment remedy itself. Mississippi's exemption statute, for example, is traceable to the laws of the Northwest Territory which first governed Mississippi as a territory.[39]

The policy supporting the exemption of a debtor's property from process is abundantly clear. It is simply that the means required by an individual to support himself and his family should be protected from creditors, even though the individual has incurred a collectible debt.

The problem which arises in relation to this policy is the decision of just how much of the debtor's property is necessary for the support of his family and thereby deserving of exemption. The problem took on new aspects once creditors began looking to wages of an employee as a source of satisfying their claim. Whereas in years past debtors were better able to fall back on some supplementary form of support for their families, today the upswing in consumer credit results in payments which a debtor must meet with his paycheck on a weekly or monthly basis. Since all too often an individual's wages are the sole means of support available for his family, the wage exemption has become increasingly important. In fact, every state permitting garnishment now provides for some wage exemption.[40]

Although every state legislature at one time or another has dealt with the problem of wage exemption, the failure of these legislatures to recognize that the economic well-being of a greatly increasing number of families depends solely on the wages of the family breadwinner has resulted in serious economic and social problems. In this day and time,

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[39] Mussman and Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 13 (1942).

[40] HANDBOOK 297-304.

when a man's wages are substantially reduced by some means, such as wage garnishment, families frequently turn to welfare in order to make ends meet. And, if welfare is unavailable, it is reasonable to assume that the family members might well seek illegal means to meet their needs.

The importance of the problem of wage exemption is obvious. However, too many states at the present time have failed to answer the problem with proper legislative solutions. A later discussion of existing statutory wage exemption legislation will point out more specifically the shortcomings of the legislation of many states.

B. *Personal Bankruptcy*

Paralleling the increase in wage garnishment in this country has been a rise in the number of personal, or non-business, bankruptcy petitions filed in the last several years. Between 1947 and 1963, non-business bankruptcies in the United States increased 1260%, while the population grew 31.3%.[41] A recent estimate shows that these bankruptcies will continue to increase.[42]

Although wage garnishment is certainly not the only cause of bankruptcies, even collection agencies admit that garnishment is frequently the straw that breaks the debtor's back, and results in his use of bankruptcy as a means of achieving financial relief.[43] One writer concludes that one indication of the direct link between bankruptcy rates and wage garnishment laws is the fact that the states with the harshest laws accounted for more than half of all personal bankruptcies in 1967. On the other hand, Texas, which prohibits garnishment entirely, has one of the lowest bankruptcy rates in the nation.[44]

Since bankruptcy relieves employees of the strain of unmanageable debts and frees the employer from the expense of answering garnishment writs, a practice has developed whereby industrial foremen advise employees to resort to voluntary liquidation in order to forestall wage garnishment.[45] These unknowing employees frequently suffer the resulting ills of unemployment, reduced income, excessive dependency upon relatives, and family breakups.

There seems to be a consensus of opinion among bankruptcy authorities that the type of wage garnishment legislation of a state significantly affects the number of non-business bankruptcies.[46] This means that in a state having garnishment legislation which favors the creditor, the debtor is more likely to incur financial difficulty which could eventually lead to bankruptcy.

This conclusion as to the effect of state garnishment legislation on personal bankruptcy, however, suffers the weakness of any conclusion founded on statistics alone. The weakness of the conclusion is that the

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[41] BRUNN, *supra* note 28 at n. 115.

[42] Porter, *Is Bankruptcy Necessary*, The Jackson Daily News, (Jackson, Miss.), July 26, 1968, at 10, col. 1.

[43] BRUNN, *supra* note 28 at n. 13.

[44] PORTER, *supra* note 42.

[45] J. COVER, *supra* note 10 at 90.

[46] BRUNN, *supra* note 28 at n. 115.

relation between wage garnishment statutes and personal bankruptcy is incapable of precise statistical measurement because the statistics fail to provide the more important factors producing them.

Thus, it is improvident to accept the aforementioned conclusion as more than an indication of the garnishment-bankruptcy relation, especially in view of the fact that the bankruptcy authorities cannot agree on the exact meaning of the few studies which have been made in this area. Though at best the measurement of the true relation between garnishment and bankruptcy is inexact, the point is that legislators should recognize the possibility that the increase in personal bankruptcies is a factor to be reckoned with in the enactment of enlightened garnishment legislation.

C. *Employee Termination Resulting from Wage Garnishment*

A third, and perhaps the greatest, problem associated with wage garnishment is the long-established policy of employers' terminating employees who are responsible for the garnishment of the employer. In order to determine how and why this problem has developed, it is necessary to examine the change in the role of the employer as the third party in the garnishment process.

As originally conceived, the garnishee played an undemanding role in the remedy of garnishment. The garnishee was merely required to retain the goods of the debtor until the court decided whether the goods should be turned over to the creditor. No right of action against the garnishee was available, other than requiring him to hold the assets of the debtor.[47] The garnishee did not have to appear in court to answer whether he was indebted to the debtor, nor did the garnishee suffer the possibility of being held liable for the debt. The garnishee simply had to hold as security for the debt the goods in his hands belonging to the debtor.

However, somewhere along the way a bright creditor, who no doubt was experiencing difficulty in serving process on his vaporous debtor, had the idea of proceeding directly against the more available garnishee in order to collect the debt owed the creditor. Lawmakers, more than willing to oblige honest creditors in their actions against unavailable and absconding debtors, enacted legislation permitting creditors to bring third party garnishees into court to answer whether they were in any way indebted to the debtors. Thus, the stricter requirement that the garnishee physically must be holding goods belonging to the debtor was supplanted with the broader concept of the garnishee's merely being indebted to the debtor. The obvious result of this development was to render more third parties subject to garnishment.

It is important to note this barely perceptible change in the role of the garnishee from merely holding goods as security to participating directly and actively in the garnishment remedy. Whereas before the garnishee was only incidental to the garnishment remedy, he now had become a principal participant. As a result, the role of the garnishee increased in importance and legal responsibility. This increased respon-

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[47] Mussman and Riesenfeld, *supra* note 39 at 16, 17.

sibility gave rise to new business expenses for the garnishee, particularly when the garnishee was an employer who was continually plagued with garnishments involving his employees. As the employer began to feel the economic strain of garnishment, he retaliated with a powerful response—termination of employees responsible for the garnishment.

Today it is common knowledge that many employers release their employees upon receipt of a garnishment writ.[48] The leniency of employer termination policies varies considerably; some employers permit several garnishments before discharging the employee, while many others terminate upon receipt of only one writ. Moreover, some employers require new employees to sign a statement stating that the employee will voluntarily resign if he ever causes a garnishment writ to be issued against his employer. This practice of terminating employment is particularly acute because it is widespread in private industry and frequently exists in state and local government agencies.

Employees, naturally enough, detest wage garnishments. They must receive notices of the garnishment, retain counsel, answer the writs, readjust payroll accounting,[49] and possibly face double liability for failure to claim the employee's exemptions.[50] Therefore, release of an employee involved in a wage garnishment is justified from the employer's view in two respects: first, the handling of wage garnishment is expensive; and, second, an employee plagued with creditors and unpaid bills is apt, through worry to become inefficient in his work.[51]

The termination, or threat of termination, of employment because of wage garnishment has ramifications other than the mere loss of a worker by the employer and the loss of a job by the employee. If the employee is fired, he and his family frequently find themselves with no means of support. Thus, they turn to welfare agencies for help and often become economic burdens to the community as members of the mounting welfare rolls. Sometimes families end up drawing welfare even though the employer permits the garnishment because the father is unable to provide for the family with the small amount left from his garnished checks.[52] Also, if the employee is threatened with termination because of garnishment, he frequently turns to personal bankruptcy as a means of avoiding creditors.[53]

All of these conditions associated with termination due to wage garnishment—the economic expense to the employer, the economic and social breakdown of the employee's family, the mounting welfare rolls, and the rise in personal bankruptcy—indicate the acuteness and depth of the problem. Unless some change in garnishment legislation is made in relation to employment termination, the area will continue to be flooded with direct and related ills.

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[48] Cobb, *Consumer Credit as it Comes to the Legal Aid Society of New York*, 196 ANNALS 201 (1938).

[49] HANDBOOK 9.

[50] Laurel v. Turner, 80 Miss. 530, 31 So. 965 (1902).

[51] HANDBOOK 9.

[52] H. BLACK, BUY NOW, PAY LATER 59 (1961).

[53] BRUNN, *supra* note 28 at 1234.

IV. Analysis of Existing Wage Garnishment Legislation

Now that we have before us the socio-economic developments which have occurred during the past few years, along with the problems resulting therefrom, it is necessary to examine in detail existing wage garnishment legislation in order to determine its weaknesses. Hopefully, such examination will point up the need and possibilities for improving the present legislation.

Generally speaking, modern wage garnishment legislation should have four objectives: first, to provide a creditor with a reasonable debt collection remedy in a situation where wages of the debtor are in the hands of the debtor's employer; second, to protect the debtor from excessively harsh treatment; third, to protect the garnishee from an overburden of expense in dealing with the garnishment; and, fourth, to provide a beneficial effect on the state's economy.

The success of wage garnishment legislation in accomplishing these objectives will depend, to a great extent, upon the degree of consideration given by lawmakers to the presently existing socio-economic factors and problems related to garnishment. The failure of legislators in the past to properly consider all the facets of the garnishment problem has resulted in unsatisfactory legislation. Only serious reconsideration of the entire problem will result in effective legislation for the future.

A detailed analysis of each individual state's statutory provisions for wage garnishment is beyond the scope of this discussion. However, a comprehensive and exhaustive compilation of the legislation of all the states indicates that even though the individual state statutes vary considerably in some details, for the most part the basic objectives of the legislation are the same.[54] Therefore, the purpose of the following analysis is to examine the basic aspects of existing legislation in order to determine how this legislation might be changed to better accomplish its objectives.

The following discussion includes analysis of four basic aspects of existing garnishment legislation: first, statutory terminology; second, exemptions from garnishment; third, pre- and post-judgment garnishment; and, fourth, notice to the employee of garnishment proceedings.

A. *Terminology*

Although a statutory action against a third party garnishee which also involves a principal creditor and principal debtor is most frequently designated as "garnishment", the action also goes by other names, especially when the action is against wages. Generally speaking, legislation providing a creditor with an action against an employer whose employee is indebted to the creditor can be broken down into three categories: first, a statute may provide for such an action by the specific name "garnishment";[55] second, a statute may provide for the action as a form of, or in aid of, an action of "attachment" or "execution";[56] and,

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[54] HANDBOOK 27.

[55] IOWA CODE ANN. ch. 642, § 642.1 (1962).

[56] ALA. CODE tit. 7 §§ 995, 996 (1958).

third, a statute may provide for the action by a special name, such as "wage deduction procedure,"[57] seizure,"[58] "trustee process,"[59] "income execution,"[60] or "suggestee execution."[61]

The term used to describe the garnishment process is unimportant except for the confusion which generally results in the law from the use of several labels to describe the same concept. Practitioners and lawmakers, as well as those individuals directly concerned with wage garnishment, are worse off because of the confusion. Although the statutory variations are generally slight, lawyers whose practice encompasses several states must sort out and master each state's particular garnishment remedy because the technical distinctions between the statutes are often significant. Moreover, lawmakers, when comparing garnishment statutes of other states in an effort to improve their own state's legislation, no doubt shy away from those states in which the basic garnishment remedy goes by another name, simply because of its seeming inapplicability and difficulty of comprehension.

The truth of the matter, however, is that the basic policy decisions which must be made by the legislators in formulating garnishment legislation are the same, no matter what the process is called. Thus, in analyzing existing legislation in order to recommend changes, the terminology should be laid aside so that the basic objectives and policies might be bared. Once the decisions are made concerning these objectives and policies, the term which best describes the decisions should be used to represent them. The desired result of this approach is legislation which is easier for the practitioner to utilize, easier for courts to interpret, and more satisfactory in general for the participants in a wage garnishment action.

The use of the word "attachment" to represent the contemporary garnishment process exemplifies the impropriety of labeling the action inaccurately. Historically, at least, attachment was an action between only two individuals whereby one of them sought to attach the property of the other as a means of providing security for an anticipated judgment.[62] When used to represent the garnishment process, however, attachment describes an action involving three people. The danger in such loose phraseology, as previously indicated, is that lawmakers are apt to give inadequate consideration to the problems created by the third party garnishee. Although the severity of the problem created by inaccurate description is open to question, the use of more representative terminology at least clarifies the perspective of the problems involved in wage garnishment.

Another term used frequently to identify the remedy of garnishment is "trustee process."[63] The only possible reason for the use of this term is that the employer-garnishee acts somewhat as a trustee in that he

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[57] ILL. ANN. STAT. ch. 62 § 71 (Smith-Hurd Supp. 1967).

[58] LA. REV. STAT. § 13:3921 (1950).

[59] ME. REV. STAT. ANN. ch. 14 § 2601 (1964).

[60] N.Y. CIV. PRAC. § 5231 (1963).

[61] W. VA. CODE ANN. § 38-5B-3 (1966).

[62] *See* p. 2 *supra.*

[63] *See* p. 24 *supra.*

holds funds owed his employee for the benefit of the creditor. In actuality, however, the employer's role in the trustee process is substantially the same as his role in the more appropriately termed "garnishment" procedure. There appears little reason for use of the term "trustee process," especially since no real fiduciary relationship exists between the employer and the creditor. The unfortunate terminology only adds to the general confusion surrounding garnishment.

Another problem of terminology existing in many state statutes is exactly what is meant by the term "wages." Statutes which fail to define what earnings are included within the term "wages" provided unnecessary litigation. For example, the question of whether a salesman's salary and commissions were "wages" was litigated in a Delaware court.[64] Then, three years later, the Delaware legislature enacted a statutory amendment expressly defining wages as including, among other earnings, salaries and commissions.[65] Such unnecessary litigation can be prevented by use of more precise language in the statutory definition of "wages."

These problems relating to terminology point up the fact that the use of precise language to describe the garnishment of wages is important insofar as it aids in the utilization, interpretation, and analysis for purposes of improvement of garnishment legislation. The term offering the best aid is one which properly connotes the relationship between the principal creditor, the employer-garnishee, and the employee-debtor. Therefore, it is reasonable to conclude that "wage garnishment" is the simplest and best term for representing accurately and clearly the concepts and relationships involved in an action against an employee's wages.

This conclusion of proper terminology does not imply that a state can improve its wage garnishment legislation merely by changing the statutory name of the process. But the conclusion is important for at least two immediate reasons: first, any state including wholesale changes in its garnishment statutes should consider using "wage garnishment" as the term best befitting their policy decisions; and, second, the draftsmen of any uniform act would do well to use the term.

B. *Exemptions*

Turning now from the consideration of terminology problems relating to descriptions of policy decisions to the more important consideration of the policy decisions themselves, it is necessary to examine first the statutory provisions for exempting certain percentages of wages from garnishment, and, second, the provisions for exempting certain individuals from garnishment.

1. Wage Exemption

The task of where to draw the line as to what percentage of wages should be exempt from garnishment has been a tough one. Evidence of this conclusion is the tremendous variation in exemptions presently exist-

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[64] Norman v. Goldman, 54 Del. 145, 173 A. 2d 607 (1961).

[65] DEL. CODE ANN tit. 10 § 4913(d) (Supp. 1966).

ing among the states.[66] Also, recent amendments of these exemptions by many states are further proof of the difficult time legislators are having in coping with the problem.[67]

The policy supporting the wage exemption is abundantly clear. The means which the debtor uses to support himself and his family should be protected from process. The problem develops with respect to just what means, in the form of wages, is necessary for support. Generally speaking, three types of wage exemptions are presently used:

1) Specific dollar amount.[68] This exemption provides that a certain number of dollars of each week's or month's wages is protected from garnishment.

2) Limiting period.[69] This method exempts wages earned during a certain period of time prior to service of the writ of garnishment. In effect, this exemption practically precludes garnishment proceedings against the employer for wages due the employee because non-exempt wages earned prior to this limiting period are generally paid before the date of process.

3) Percentage statute.[70] This method exempts a certain percentage of the employee's wages. There are two types of percentage statutes:

a) With amount limitations. This type statute has both ceiling and floor limitations in addition to the percentage exemption. For example, 75% of the employee's wages is exempt from garnishment; $100.00 per month is entirely exempt; any amount over $250.00 per month is entirely non-exempt.

b) Without amount limitations. This type statute merely exempts a certain percentage of the wages with no mention of a minimum limitation.

An analysis of these three types of wage exemption statutes reveals the problems and weaknesses which accompany them. The specific dollar amount exemption is the simplest of the three. It is submitted, however, that it is the least desirable. This statute exempts completely the first $100.00 or so of wages per month. However, any amount in excess of this $100.00 is 100% open to garnishment. Thus, a family of five, for example, could be left with only $100.00 per month to live on.

The limitation period exemption is much more favorable to the debtor. In fact, use of this method could all but frustrate entirely the efforts of the creditor to collect on the debt. This statute limits the period of time prior to the service of the writ to which the garnishment is applicable. If the non-exempt wages earned before this period are paid before the date of process, the creditor is left with precious little to go after because the wages already paid are no longer in the hands of the employer and thus not subject to garnishment.

The percentage exemption statute seems to come closest of the exemption statutes to properly balancing the conflicting interests of the

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[66] HANDBOOK 297-304.

[67] Mississippi amended its exemption statute in 1966. MISS. CODE ANN. § 307 (Supp. 1966).

[68] Comment, *State Wage Exemption Laws and the New Iowa Statute—A Comparative Analysis,* 43 IOWA L. REV. 555, 556, (1957).

[69] *Id.*

[70] *Id.* at 557.

debtor and creditor. The conflict between the two boils down to the fact that a creditor wants the debt satisfied, whereas the debtor-employee needs a certain amount of his wages to adequately provide for himself and his family.

The type of percentage exemption statute *without* amount limitations approaches the problem in the right direction, but does not go far enough. The new Mississippi exemption statute, for example, is of this type.[71] Whereas, in the past Mississippi had a specific dollar exemption of $100.00 per month,[72] 75% of an employee's wages are now exempt. At first blush this revision appears highly desirable for the debtor. However, closer scrutiny of the statute reveals that those employees who receive less than $133.33 per month are worse off now than under the old law. For example, take an employee who makes $125.00 per month: Under the old law only $25.00 of this amount was available for garnishment, leaving the employee $100.00 per month to support himself and his family. Under the new law, $31.25 is available, leaving the employee only $93.75 to support himself and his family. Thus, the extremely low wage-earner, who without a doubt should benefit most from an exemption statute, is actually penalized.

Such an inequitable result is prevented by a percentage exemption statute *with* amount limitations. In the example above, if the $100.00 per month limitation had been retained, the statute would come closer to achieving the policy of exemption. Under this statute, any amount up to $100.00 per month would be entirely exempt, and any amount over $100.00 would be 75% exempt. Thus, an employee making $125.00 per month would lose only $6.25 to garnishment. Although, for practical purposes, a ceiling limitation would be of little need, it would apply to the benefit of creditors. By enacting a ceiling of $400.00 per month, for example, any amount over $400.00 would be totally non-exempt and thus 100% open to garnishment by the creditor.

The wage exemption provisions of the garnishment section of the Consumer Credit Protection Act, will become effective July 1, 1970.[73] These provisions appear to be the best solution available for the exemption problem. The provisions provide a 75% wage exemption with a minimum limitation. The minimum limitation is the lesser of two amounts: 25% of the weekly take-home pay or thirty times the federal minimum hourly wage. This minimum limitation is superior to a fixed dollar amount minimum, such as $100.00 per month, because the former is self-adjusting, whereas the latter would require amendment after a few years in order to remain current with economic inflation.

2. Public Employee Exemption

One of the early developments of the common law of garnishment was the exemption of wages of employees of governmental bodies from

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[71] MISS CODE ANN. § 307(10) (Supp. 1966).

[72] MISS. CODE ANN. § 307(10) (1956).

[73] CONSUMER CREDIT PROTECTION ACT 36 U.S.L.W. 108, Pub. L. No. 90-321 (May 29, 1968).

process.[74] Later on, state legislatures began embodying these exemptions in the form of public employee exemption statutes.[75] At this time, the general rule was that employees of a state, federal, territorial or local government, were exempt from wage garnishment.[76]

The reasons advanced for this exemption can be summarized as follows:

> 1. Garnishment is a civil suit of the kind where the state may insist on its sovereign immunity. Such a suit is not allowed except in the form authorized by the state's legislature.
> 2. "Public policy" forbids the garnishment. To permit suits of this kind would hinder the public servants in carrying out their normal functions. Thus, the public interest prevails over the private interest of the creditor.[77]

The state legislatures began shrugging off these reasons for exempting public employees at an early date. In 1891, a Montana court construed the word "person" in the state's garnishment statute to apply to public employees.[78] In 1901, the Montana legislature amended the statute to permit garnishment of public employees.[79]

Several states followed the precedent set by Montana and adopted similar statutes. At present, thirty-eight states permit some form of statutory garnishment of public employees.[80]

In light of the foregoing facts, it is obvious that a reappraisal of

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[74] Merwin v. Chicago, 45 Ill. 133, 135 (1867).

[75] *E.g.*, PA. STAT. ANN. tit. 42, § 886 (1966).

[76] AM. JUR. 2d *Attachment and Garnishment* § 78 (1963).

[77] Clark v. Osage Co., 62 Okla. 7, 161 Pac. 791 (1916).

[78] Waterbury v. Board of Commissioners, 10 Mont. 515, 520, 26 Pac. 1002 (1891).

[79] MONT. REV. CODE ANN. § 93-4341 (1963).

[80] ALA. CODE tit. 7, § 1032 (1958); ALAS. STAT. § 09.35.330 (1962); ARIZ. REV. STAT. ANN. § 12-1601 (1956); ARK. STAT. ANN. § 31-519 (1962); CAL. CODE CIV. PROC. § 710; COLO. REV. STAT. ANN. §§ 77-12-1 through 77-12-5 (1963); CONN. GEN. STAT. REV. § 52-361 (1958); DEL. CODE ANN. tit. 10, § 3503 (1953); GA. CODE ANN. §§ 46-801 through 46-805 (1965); HAWAII REV. LAWS §§ 238-1 through 238-6 (1955); IDAHO CODE ANN. § 11-202 (1947); IND. ANN. STAT. § 2-4406 (1964); KAN. GEN. STAT. ANN. § 60-723 (1964); KY. REV. STAT. § 427.130(1), (2), (1962); LA. REV. STAT. ANN. § 13.3881 (1968); MINN. STAT. § 571.45 (1945); MISS. CODE ANN. § 2783 (1956); MO. ANN. STAT. § 525-310 (1949); MONT. REV. CODE ANN. § 93-4341 (1963); NEB. REV. STAT. § 25-1012 (1964); NEV. REV. STAT. § 281-130(1) (1967); N.H. REV. STAT. ANN. § 512.9 N.J. REV. STAT. § 2A:17-53 (1951); N.M. STAT. ANN. § 26-6-28 (1953); N.Y. CIV. PRAC. 5231(f) (1963); N.D. CENT. CODE ANN. § 32-09-01 (1960); OHIO REV. CODE ANN. § 115.46 (Page 1953); OKLA. STAT. tit. 12, § 1194 (1961); ORE. REV. STAT. § 23.190 (1968); R.I. GEN. LAWS ANN. § 10-17-17 (1956); S.D. CODE § 37.2801 (1939); TENN. CODE ANN. § 26-518 (1955); VT. STAT. ANN. tit. 12, § 3053 (1958); VA. CODE ANN. § 8-449.1 (1950); WASH. REV. CODE ANN. § 7.32.060 (Supp. 1956); W. VA. CODE ANN. § 38-58-3 (1966); WIS. STAT. ANN. § 304.215(1) (1958); WYO. STAT. ANN. § 1-433 (1957).

the objectives of public employee exemption statutes is appropriate and necessary. To determine the need for such a statute, certain observations should be made.

First of all, the mere fact that the states are so widely split on the question, points up the need for re-analysis. There is little reason to believe that states with the exemption statute and those without it are both achieving proper results. Although the limited scope of this note precludes any sort of conclusion as to which side has the more appropriate objective, the following discussion subjects the policies of both sides to a surface analysis of the issues involved.

Evidently, the lawmakers enacting public employee exemption statutes felt that the public weal should not be sacrificed by permitting creditors to harass public employees with wage garnishment suits. However, the relative ease of handling garnishments of public employees provided by slight procedural changes in the garnishment process renders this reason for exemption questionable at least.

For example, in Colorado the garnishee may answer directly to the levying officer,[81] in Nebraska he may answer in person, in writing, or by mail;[82] and in Michigan the employer receives a fee of $1.00 for his trouble.[83]

Although these changes are not conclusive of the fact that answering garnishments of public employees is easier and less expensive than it might once have been, some doubt is raised as to the continuing validity of the idea that an exemption statute is necessary in order to prevent extreme inconvenience and expense to the body politic.

We now turn to the consideration of the reasons influencing the legislatures of other states which have provided statutes expressly permitting garnishment of public employees. Presumably the primary increase for such statutes was the belief of lawmakers that an individual creditor's right to collect from his debtor should not be frustrated merely because of some expense and inconvenience to the various governmental bodies. In other words, the right of the individual in this case should transcend the public interest.

Although the concern for the individual in the person of the creditor might well have been at one time a valid reason for permitting garnishment of public employees, a close look at current conditions might call for a reversal of position on this subject. Lawmakers who claim to be concerned with the interest of the individual should realize that today, more than ever before, another individual, the debtor, is likewise greatly affected by legislation permitting garnishment. At the time of enactment of this legislation, quite possibly few, if any, employees were losing their jobs because of wage garnishment. Today it is common knowledge that numerous public employees suffer termination as a result of garnishment suits. Therefore, it is at least arguable that concern for the interest of the individual should motivate lawmakers to disallow wage garnishment of public employees, rather than permit it.

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[81] COLO. REV. STAT. ANN. § 79-10-3 (1963).

[82] NEB. REV. STAT. § 25-1013 (1943).

[83] MICH. STAT. ANN. Rule 738.4.

The foregoing observations deserve consideration by legislators attempting to determine whether to retain, enact, or repeal public employee exemption statutes. A much more thorough study of the problem is necessary in order to determine the most desirable course to follow. For this reason, the only concrete conclusion drawn here is that such a study is long overdue in most states.

C. *Pre and Post Judgment Garnishment*

Garnishment is permitted in most states at two different times—before judgment is rendered in the proposed action, and after judgment.[84] On the other hand, a few states permit garnishment only after judgment.[85] The following discussion analyzes both pre and post judgment garnishment in order to determine which states have the better statute in this regard.

The purpose of allowing garnishment before judgment is to provide the creditor with security in the event he obtains a judgment.[86] Presumably, prejudgment garnishment frustrates in part the debtor who chooses to flee with his last paycheck and leave the creditor with little means of satisfying his judgment. Moreover, the creditor can satisfy his judgment quicker because the garnishment results in an accumulation of the employee's wages which are immediately applied against the judgment.

In reality, however, it is difficult to believe the garnishment before judgment achieves its purpose. With the increasing exemptions which the states are rightfully granting employees, precious little money is left to serve as security for the creditor. In fact, by garnishing an employee, the creditor often cuts off his nose to spite his face. This is true because more often than not the employee is terminated after his employer receives the writ. As a result, the employee has no more wages subject to garnishment, and the only money left for the creditor to apply against his judgment is the small amount of the employee's nonexempt wages.

The situation described above presupposes the fact that the creditor later obtains a judgment. If by some unusual circumstance the creditor failed to obtain the judgment, the result of allowing prejudgment garnishment could be even worse. In such an instance, the employee could well be terminated, even though a judgment was never rendered against him. Such an occurrence would be unduly harmful to the employee because of his loss of employment, to the employer because of his loss of an employee, and to the community because of the addition of the former employee to the ranks of the unemployed.

Creditors, of course, are not unaware of the fact that a terminated employee is unable to pay his debt. Thus, it would seem that the creditors would never garnish an employee if they knew that his employer had a policy of termination upon receipt of a garnishment writ. It appears, however, that all too often creditors who are frustrated because

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[84] Miss. Code Ann. §§ 2785, 2786 (1956).

[85] Mass. Ann. Laws ch. 246 § 32(8) (1956).

[86] Handbook 27.

[87] H. Black, *supra* note 52 at 145.

of the high wage exemption will garnish the employee merely for harassment.[87]

Unfortunately, the harassment is not restricted to prejudgment garnishments but exists as well after judgment has been rendered against the employee. Once judgment has been dutifully rendered, the creditor is, as he obviously should be, able to garnish the employee, even at the risk of the employee's losing his job. But surely the employee should be protected against this revengeful type of action when no judgment has even been rendered against him.

The conclusion which follows from the foregoing observations is that pre-judgment garnishment should not be allowed for two reasons: one, the high wage exemptions now allowed most employees prevents achievement of the objective of providing realistic security for the creditor's anticipated judgment; and, two, the allowance of such an action permits creditor harassment which often results in termination of the employee.

As noted previously, garnishment after judgment has already been rendered against the debtor in the principal action differs considerably from pre-judgment garnishment. After judgment has been rendered in favor of the creditor in his action against the debtor, a legal right to satisfy the judgment vests in the creditor. Therefore, if garnishment is allowable at all, it certainly should be permitted in execution of the judgment.

D. *Notice to the Employee of Institution of Garnishment Proceedings*

Requirements of giving notice to the employee-debtor of the garnishment action are quite varied. Most of the notice requirements are provided by statute, but the case law of some states provides the requirements.

In the absence of a statute controlling the giving of notice to the debtor, courts have reached conflicting conclusions. The U. S. Supreme Court in *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*,[88] held that in the absence of a statute, the creditor was not obligated to give notice to the debtor. The exact opposite result was reached in *Union P. R. Co. v. Smersh*,[89] where the Nebraska court held that the creditor must give notice to the debtor. Still another court, addressing itself to the question of who should give notice, held that the employer, rather than the creditor, should give notice.[90]

Because of the wide variety of notice requirements contained in the statutes of the different states, there is no more uniformity of notice to the debtor even when the question is specifically covered by statute. Although the individual statutes vary in any number of ways, the following analysis dwells on two aspects of notice—who gives the notice to the debtor and when the notice is given.

In a few jurisdictions, the creditor's demand on the employer under

[88] Endicott Johnson Corp. v. Encyclopedia Press Inc., 266 U.S. 285, 69 L.Ed. 288, 45. S. Ct. 61 (1924).

[89] Union Pac. Ry. v. Smersh, 22 Neb. 751, 36 N.W. 139 (1888).

[90] St. Louis & S.R.F. Co. v. Crews, 51 Okla. 144, 151 Pac. 879 (1915).

a wage assignment is of no effect unless a notice has been served on the employee.[91] In those states which have such a provision, as a general rule the statutory responsibility of giving notice of the garnishment to the debtor falls on one of three persons: the clerk of the court in which the garnishment is filed,[92] the employer,[93] or the creditor himself.[94]

The statutory provisions of when notice must be given to the debtor are equally varied. For example, the Alabama statute requires that notice be given the employee upon the employer's answer to the creditor's action.[95] Similarly, Maryland requires notice to the debtor-employee by the employer upon the employer's being summoned.[96] The New York statute, which is unique in this respect, requires that notice be given the employee within twenty days after an execution order is received by the sheriff. Only upon the employee's default in payment will notice of execution be given the employer.[97]

A proper analysis of the reasons for the statutory variation of who should give notice to the debtor, and when this notice should be given, must focus on the purposes behind the notice requirement itself.

The traditional notice requirement, which is the type found in most state statutes, was probably provided in order to satisfy the due process clause of the Fourteenth Amendment. The inspiration for the enactment of such a provision was provided by the fact that lack of a notice provision has served as the springboard for the attack on the constitutionality of wage garnishment on more than one occasion.[98]

The modern notice requirement, exemplified by the New York statute, has a different purpose. The purpose of this notice, which must be given to the employee 20 days before it is given to the employer, is to allow the employee time to arrange payment of his debt. Thus the statute is designed to reduce the number of terminations of indebted employees by giving the employee the chance to settle his debt without his employer's ever being brought into the picture.

With the differences in the purposes of the traditional notice requirement and the modern notice requirement in mind, the variations in the different states of who is responsible for giving notice, and when notice is given, become more obvious.

In states having a traditional notice provision, the decision of who should give the employee notice is important only with respect to the party required to give the notice. It matters little to the employee whether he receives notice from his creditor, his employer, or the court clerk. However, since the person who is required to give notice must bear the burden and expense of doing so, the fact that he has this responsibility is important to him. Therefore, it is reasonable to conclude

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[91] HANDBOOK 21.

[92] *E.g.*, ALA. CODE tit. 7, § 1011 (1958).

[93] MICH. STAT. ANN. Rule 738.3.

[94] *E.g.*, CAL. CIV. PROC. CODE § 690.11 (Supp. 1968).

[95] ALA. CODE tit. 7, § 1011 (1958).

[96] Cole v. Randall Park Holding Co., 201 Md. 616, 95 A.2d 273 (1953).

[97] N.Y. CIV. PRAC. § 5231 (1963).

[98] McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928); Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932).

that in traditional notice states, the decision of who should give notice should focus on the notice-giver, rather than the employee receiving the notice.

In modern notice states, the tables are switched, and the interest of the employee in the notice provision is deemed to be of superior consideration. It is important to the employee that someone other than his employer give him notice of the impending garnishment. In New York, for example, since its statute is designed to reduce terminations resulting from wage garnishment of employees by allowing the employee an opportunity to settle his debt before the employer becomes involved, the purpose of the notice statute would be frustrated if the employer were responsible for giving the employee notice.

Turning now to the variation among the states of *when* notice must be given, the analytical dichotomy of traditional notice and modern notice is once again helpful.

Although the traditional notice of states varies in minor ways, with respect to when notice must be given, the slight variations are insignificant. Once again, the purpose of these traditional notice statutes is merely to apprise the employee of the institution of a garnishment against him. Therefore, whether the employee is notified upon the employer's answer, or upon the employer's being summoned, is of little practical importance. So long as the employee is notified prior to the adjudication of the garnishment proceeding, the purpose of the traditional notice statute is fulfilled.

Such is not the case with the modern notice statute. Since the purpose of this type statute is to allow the employee to work out his problem, *when* notice is to be given takes on greater importance. For one thing, the employee must receive notice before the employer. To allow otherwise would be to work directly against the intention of the statute. Therefore, the employee must be given notice several days prior to the giving of notice to the employer. Also, the employer receives no notice at all unless the employee defaults in his settlement with the creditor.

Since termination of employees because of wage garnishment is such a problem, it would appear that the modern notice statute currently existing in New York is the necessary cure-all. However, a New York authority, who previously had advocated such legislation, has since recanted.[99] Professor David Siegel, after observing the working of the statute for almost a year, asserts that the statute is not having much success. According to Professor Siegel, various figures show that New York debtors only responded from 11% to 20% of the time. Professor Siegel queried whether a proportion of one out of five debtors warranted the continuation of the practice, and concluded that complications of judgment creditors and enforcement procedures and extra fees in 80% of the garnishments necessitated a reconsideration of this approach to the problem of termination.

Assuming Professor Siegel's observations to be accurate, it appears that New York's attempted remedy of employee termination resulting

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[99] D. Seigel, Supplementary Practice Commentary, 1964, N.Y. Civ. Prac. § 5231 (McKinney Supp. 1967).

from wage garnishment is just another example of a solution which looks good on paper, but is ineffective in practice. However, provided that some of the statistics upon which Professor Siegel makes his judgment were compiled in New York City, it should be noted that the mere size of the city could well be responsible for at least some part of the ineffectiveness. Any city the size of New York usually experiences more difficulty in working out its problems. Therefore, although the modern notice provision seems to be falling short of achieving its purpose in New York, it is possible that such a provision might have greater success in smaller cities and less populous states. At any rate, the small degree of success achieved by New York should not cause the legislators of other states to toll the death knell of modern notice provisions without a long look at its possibility of success in their own particular states.

V. Conclusion

The surest conclusion which can be reached from the foregoing discussion of wage garnishment is that a great deal more study of the problem is needed especially in the individual states contemplating changes in existing legislation. In addition to the need for more statistical and analytical studies, more research should be done in evaluating the interrelationship of wage garnishment, consumer credit, personal non-business bankruptcy, employee termination, and their subsequent effects on the economy and the individuals involved.

Moreover, legislators need to realize, like it or not, that debt is a fact of life in our society. Some states should consider increasing the amount of wages exempt from garnishment in order to check unrelenting creditors who selfishly seek the amount due them with no concern for the debtor. Also, modern notice legislation should be considered as a solution of the ever-increasing problem of employee terminations resulting from wage garnishment.

Particular attention should be given to the status of public employees in those states which continue to exempt this group from wage garnishment. As the government continues to play an increasing role in our society, more individuals will come to be classified in this category. Justification for continued exemption of these employees thus will be strained.

More private employers in the future will face the problem of wage garnishment and employee termination in their negotiations with labor unions. In those areas of the country now becoming more industrialized, increasing numbers of people will become wage-earners and ultimately subject their employers to the expensive task of answering garnishments. These employers would do well to investigate the feasibility of debt-counseling programs for their employees in order to head off such a problem.

Lawmakers who are re-evaluating the wage garnishment legislation presently existing in their state should realize that this area of the law is froth with problems. In addition to those problems discussed here, attention should be directed to problems such as multiple levies, repeated levies, out of state garnishments, interpleader provisions, and

the like. Also, attention should be given to the wage garnishment provisions of the Consumer Credit Protection Act in order to head off possible state-federal conflicts.

At the same time that lawmakers are studying the problems of wage garnishment, they would be wise to observe that what seems to be a workable solution for one state might not be a proper solution for another state. Highly populated states with large cities do not necessarily have the same problems with garnishment as do sparsely populated states with small towns.

Finally, lawmakers in the future will probably hear more and more recommendations that the remedy of wage garnishment be abolished altogether. The trend toward increased exemptions is certainly a step in that direction. And, it should be remembered, two states have managed to survive without such a remedy at all.

As for those lawmakers who decide to maintain the remedy of wage garnishment, they should recognize the need for a new look at its problems and realize that enlightened garnishment legislation which takes into account these problems is good for the debtor, the employer, and the economy and society in general.

Clifford C. Thompson

Insurance—Automobile Liability Insurance: The Omnibus Clause and Employee Use

I. Omnibus Clauses Generally

Automobile liability insurance policies typically contain a provision which extends the coverage of the policy beyond the named insured to any person using the vehicle with the insured's "permission."[1] Such an "omnibus clause" may be an optional feature of the policy, or its inclusion may be required by the laws of the state in which the policy is sold.[2] Although the precise wording of the clause may vary,[3] so as to require that the "actual use" of the vehicle, rather than merely the "use" be with the insured's permission or so as to require the "consent" of the insured, rather than this "permission," it is generally agreed that the variations in wording have not substantially influenced judicial interpretation of the clause.[4]

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[1] The standard omnibus clause provides that the definition of the insured includes "any person while using an owned automobile or hired automobile or any person or organization responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission . . . ."

[2] *See, e.g.*, 12 Couch, Cyclopedia of Insurance Law § 45:658 (2d ed. 1964) [hereinafter cited as Couch]; Blashfield, Automobile Law and Practice § 315.6 (3d ed. 1966). [hereinafter cited as Blashfield]. Mississippi has such a statute. Mississippi Motor Vehicle Safety Responsibility Act, Miss. Code Ann. § 8285-01 *et seq.* (1956).

[3] For variations in wording *see* 12 Couch § 45:319.

[4] 5 A.L.R.2d 600, 607. *But see* 12 Couch § 45:329.

It appears that the omnibus clause was designed originally to protect members of the insured's household in their use of the family car.[5] It must also have been the wish of the purchaser of liability insurance to provide protection to friends or employees to whom he lent the car and to protect himself should the negligence of one using the vehicle be imputed to him. Increasingly legislatures require the inclusion of an omnibus clause in any automobile liability policy sold in the state. This requirement is viewed as a measure to afford protection to the general motoring public by enhancing the probability that there will be available a financially responsible defendant—an insurance company.[6]

The omnibus clause has given rise to considerable litigation addressed to the question of whether the use of the automobile was "with the insured's permission." Consider the case in which A lends his car to B so that B may go to town on a personal errand. B takes the car, but changes his mind and decides to drive out of town a few miles to visit a friend. During this excursion B is involved in an accident caused by his negligence. B may be unable to pay a judgment rendered against him. Even though there is no way to recover from A under a theory of imputed negligence, the plaintiff, nevertheless, may be able to require A's insurance company to indemnify B. The inquiry becomes: Was B using the car with the permission of named insured, A?

The burden is on the plaintiff to prove that the use of the car was with the insured's permission. Specifically, the plaintiff must show that B had initial permission, either expressed or implied, to use the car. Secondly, the plaintiff must establish the scope of the permission given. Finally, he must consider whether there was a deviation from the permission given and be prepared to argue the significance of that deviation.

II. The Special Case of An Employee

The legal significance of a deviation from the permission granted has been the most troublesome issue in omnibus clause construction. Although such a question may be involved each time one lends his car to a person who then has an accident, litigation over the question of permissive use has been most frequent in the cases in which an employer lends his automobile to an employee. It is said that the question of deviation is more easily resolved when the car is lent to family or friends because of the general willingness of the courts to accord a broader scope to the permission given when the car is lent in a social rather than a business context.[7] Also, although the doctrine of ratification is not available to the insured,[8] it is likely that in a social context he will be willing to dismiss the question of deviation. Finally, deviations are often brought out in the employer-employee situation because the plaintiff sues the employer, seeking to hold him liable under the doctrine of

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[5] Ryan v. Western Pac. Ins. Co., 242 Ore. 84, 408 P.2d 84, 86 (1965).

[6] 7 BLASHFIELD § 315.6.

[7] 5 A.L.R.2d 600, 602. *But see,* Arnold v. State Farm Mut. Auto. Ins. Co., 260 F.2d 161 (7th Cir. 1958).

[8] C. H. Elle Const. Co. v. Western Cas. and Sur. Co., 294 F.2d 459 (9th Cir.

respondeat superior. In his defense the employer points out the deviations. The deviations are often sufficient to remove the employee from the scope of his employment but not from the protection of the omnibus clause.

Because this question of deviation has arisen most frequently in the employer-employee context and because two recently decided Mississippi cases have considered deviation in an employer-employee context, this note is concerned solely with that issue.

III. Three Rules of Construction

The authorities state that the holdings of the various jurisdictions can be classified according to whether they follow one of three rules of omnibus clause construction.[9] The first rule is said to be the "strict rule." According to this rule *any* deviation from the permission granted removes the operator from the coverage of the policy. Thus if the use of the automobile at the time of the accident was not the precise use authorized by the lender, the operator is not covered. A second rule is the "liberal rule;" once the plaintiff has established initial permission of the employee to use the automobile, deviations from the permission granted will not defeat coverage. "Permission" is taken to mean permission to use the car in the first instance; if this is established, the employee is using the car "with the permission of the insured." The strict and the liberal rules are minority positions.

The third rule, said to be the majority rule[10] and the rule which is increasing in popularity,[11] is the "minor deviation rule." This rule is that if an employee receives permission to use the automobile, a minor deviation from the permission granted will not prevent coverage, yet a gross or substantial deviation will.

It is worth noting that the approach to omnibus clause construction recently taken by the Oregon court[12] is seen as establishing a fourth rule, the "gross deviation rule."[13] According to this rule, if the employee has permission to make a *personal* use of the car, only a gross deviation will annul the coverage of the policy.

IV. Mississippi Cases

In two recent cases[14] the Mississippi Supreme Court has for the first time ruled on the effect of a deviation from the permission granted. The first case, decided in 1966, is *Employers Mutual Casualty Company*

1961), and Hanover Ins. Co. v. Abchal, 375 S.W.2d 605 (Mo. App. 1964).

[9] 5 A.L.R.2d 600; 12 COUCH § 45:463; 7 BLASHFIELD § 315.12.

[10] *See*, BLASHFIELD § 315.12.

[11] 12 COUCH § 45:474.

[12] Ryan v. Western Pac. Ins. Co., 242 Ore. 84, 408 P.2d 84, 88 (1965).

[13] 5 A.L.R.2d 600 (Later Case Service Supp. 1968, § 15.5).

[14] Since completion of this paper, the Mississippi Supreme Court has decided a third case involving omnibus clause construction. That case is beyond the scope of this note because it deals with the situation in which the person to whom the car was

v. *Poe*.[15] In this case the employer operated an auto sales business. He allowed an employee to borrow a company car so that the employee would have transportation to his home and back to work the following morning. The employer testified:

> At quitting time that afternoon, his car was out of running order, he was waiting around for me to carry him home. I told him he could take that car and go on home and back to work in the morning, if he was not going anywhere else, and he said he was only going home.[16]

The employee lived about two miles north of his place of employment. Instead of going north to his home, the employee picked up a friend and together they drove south some twenty miles to visit a mutual friend. It was during this excursion that the accident took place. The court observed that at the time of the accident the employee "was so intoxicated that he did not know where he was."

After reviewing the three rules of omnibus clause construction, the court refrained from categorically adopting any one. Yet the court applied the "minor deviation rule" and found:

> . . . that there is not present here a slight deviation from the scope of the permission granted, but, to the contrary, there is such a violent deviation on the part of Tucker [the employee] that it cannot be said reasonably that the employer could have possibly anticipated that Tucker would deviate from the explicit permission granted and engage upon a venture such as is presented here.[17]

Finding a material deviation, the court held that the employee was not covered.

Several points brought out by the court in this decision are of interest. The court noted that the clause presented no ambiguity which could be resolved against the insured. (Some cases indicate that the clause is ambiguous and should be construed most favorably to the person seeking coverage.[18]) Further, the court observed that the omnibus clause under interpretation required that the "actual use" of the car be with the insured's permission and noted, without comment, that some authorities see the change in wording from "use" to "actual use" as an attempt to make it clear that the use at the time of the accident had to be one contemplated by the parties when the original bailment was made. The court also observed that the use was unanticipated, that there was no evidence to indicate that the employer knew the employee

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lent initially lends the car to a third person. In International Serv. Ins. Co. v. Ballard, #45,103 (December 9, 1968) the court held that the third party was covered. That decision is consistent with the thesis of this paper.

[15] 191 So.2d 541 (Miss. 1966).

[16] *Id.* at 546.

[17] *Id.* at 546-47.

[18] 12 COUCH 45:294.

to be a drinking man and that the use was "purely for his [the employee's] own esoteric interest."[19]

The second case in which the court has construed the omnibus clause is *Travelers Indemnity Company* v. *Watkins*,[20] decided in 1968. In this case a nine man court explicitly adopted the "minor deviation rule," but split five to four on the question of coverage. The Chief Justice, speaking for the majority, found that the deviation from the permission extended to the employee was not such as to annul the coverage.

The employee had received permission from his supervisor to borrow a company truck for the purpose of transporting a calf to his home. This was on Saturday afternoon. The employee inquired as to whether he should return the truck that afternoon. The supervisor testified that he replied, "No, leave it at home, leave it in the yard there and bring it back on Monday morning."[21] Rather than leave the truck parked in his yard over the weekend, the employee drove the truck on Sunday morning to pick up his wife from church; it was then that the accident occurred.

The majority recognized that:

> Nunn [the employee] understood the limitations on his use of the truck, and that he was not supposed to use it on Sunday. However, there was no positive, express prohibition against using the truck on Sunday, although it is clear that the permission was limited to taking the calf from Riverside's plant to Nunn's home on Saturday afternoon and returning the truck on Monday morning.[22]

Nevertheless, the majority felt that the employee should be covered. The court relied primarily on the state policy, as manifested in the Mississippi Motor Vehicle Safety Responsibility Act[23] and the Uninsured Motor Vehicle Act,[24] of "protecting the public and providing insurance coverage where persons are insured [injured?] on the highways of the state."[25] The court observed that the former statute required the inclusion of an omnibus clause in automobile liability policies. Finally the court distinguished *Poe* by pointing out that there the use was a "violent deviation" whereas in *Watkins*

> . . . there were three broad factors as far as the permission was concerned: (1) time—that is, from Saturday afternoon until Monday morning, (2) place—that is, the general area wherein the truck was to be used and (3) use—that is, a use that was personal to Nunn.[26]

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[19] Employers Mut. Cas. Co. v. Poe, 191 So.2d 541, 547 (Miss. 1967).
[20] 209 So.2d 630 (Miss. 1968).
[21] *Id.* at 631.
[22] *Id.* at 631-32.
[23] Miss. Code Ann. § 8285-01 *et seq.* (1956).
[24] Miss. Code Ann. § 8285-51 *et seq.* (Supp. 1966).
[25] Travelers Indem. Co. v. Watkins, 209 So.2d 630 (Miss. 1968).
[26] *Id.* at 633.

Since the majority felt that the truck was being used within the limitation of these factors, it held that the employee was covered by the omnibus clause.

The dissent agreed with the majority's preference for the minor deviation rule; it disagreed, however, that the deviation was minor. The dissent noted that it was clear that the car was not to be used on Sunday morning.

> Nothing is more repugnant to the idea of permissive use than a use which contravenes the well understood instructions of the owner under which the possession of the vehicle was obtained . . . Of course, it is possible to envision a case where a motor vehicle is entrusted by the owner to another who afterwards employs it for unanticipated use, but a use not counter to or beyond the purview of the owner's permission. In such a case, in the light of a general public policy indicated through the enactment of the Mississippi Motor Vehicle Safety Responsibility Act, an implication that the use was permissive might be justified by circumstances established by evidence.[27]

Thus while the majority views the use on Sunday as a deviation from the permission granted, it felt that the deviation was minor and should be overlooked in part at least, because of public policy. The minority, on the other hand, views the use on Sunday morning as a substantial deviation because the employee violated the instructions given.

It is not surprising to find the Mississippi court in conflict over the application of the omnibus clause. The question of deviation has been a difficult one for the courts and as Blashfield observes:

> The authorities are in confusion, possibly even in conflict, as to the effect of a departure, with respect to route, purpose, or other particulars, from the use consented to by the owner, on the permittee's status as an insured under an omnibus or extended coverage clause . . .[28]

Certainly this is true to some extent, and as *Watkins* indicates, agreement on a rule does not indicate agreement as to how a particular case should be decided.

V. Inadequacies of the Traditional Classification

It is submitted that the traditional classification of jurisdictions according to whether they follow the strict, the liberal, or the minor deviation rule has been of little value in clearing up the confusion. This traditional method of classification does not reconcile the various decisions, nor does it adequately distinguish them. It is often misleading,

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[27] *Id.* at 637.

[28] 7 BLASHFIELD § 315.12.

and at best only a general classification which has little relevance in practice. Several factors support this conclusion.

The traditional classification is often misleading for, admittedly, jurisdictions which are said to follow the strict rule will at times overlook a slight deviation.[29] Similarly, jurisdictions which are said to follow the liberal rule will not always tolerate gross deviations. A case in point is *Johnson* v. *American Automobile Insurance Co.*,[31] a 1932 Maine decision often cited as espousing the strict rule. In this case an employer gave his car to an employee and instructed the employee to drive the car to his home to wash and polish it. The employee took the car home and washed it. Rather than dry the car and polish it, the employee went for a pleasure ride, allegedly a ride to dry the car. He drove to his aunt's home and then to the home of a friend. At this stop he picked up a young lady and drove her on a personal errand. It was then that he crashed into a telephone pole and injured the rider. The employee had been entrusted with the car at 8:30 A.M. He was told to return the car by 11:30 A.M. The accident occurred at 11:15 A.M. Even if there had been no accident, the employee would not have had time to polish the car and return it by 11:30. The court held that the employee was not covered by the omnibus clause. This case is cited as authority for the strict rule.[32] It seems that the case could easily be authority for the minor deviation rule.

In a subsequent Maine decision the court protested the classification of *Johnson* as espousing the strict rule:

> We find nothing in Johnson which would deny coverage where the actual use is primarily for the purpose for which permission was given and there are no more than minor deviations as to time and place of operation.[33]

The traditional classification is misleading also because it fails to highlight the fact situation which may have led the court to reach a particular result. The Tennessee case of *Stovall* v. *New York Indemnity Company*[34] and subsequent decisions in that jurisdiction indicate the imprudence of classifying a jurisdiction in the traditional manner, without adequate regard for the fact situation and relying on that classification as an indication of how a particular jurisdiction will decide a question.

Stovall was one of the earliest cases to deal with omnibus clause interpretation; in fact, the author of the opinion stated that he found only one other case dealing with the question of deviation from a permitted use.[35] The fact situation in *Stovall* is complicated. The em-

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[29] 5 A.L.R.2d 600, 637.

[30] *Id.*

[31] 131 Me. 288, 161 A. 496 (1932).

[32] 5 A.L.R.2d. 600, 626.

[33] Savage v. American Mut. Liab. Ins. Co., 158 Me. 253, 182 A.2d 669, 671 (1962).

[34] 157 Tenn. 301, 8 S.W.2d 473 (1931).

[35] That case was Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 A. 866 (1924).

ployee was a traveling salesman in south Mississippi who retained general custody of his employer's car. He had been instructed not to use the car for personal purposes. On the particular weekend in question the employee was required to be in Memphis for a convention which his company was sponsoring. When Stovall arrived in Memphis, he was required to put the company car in a private garage, one designated by his employer. He was instructed to turn the claim ticket over to a superior; he did this. The supervisor kept the claim ticket and apparently the claim tickets for all the company's cars. His purpose in doing this was to coordinate the transportation for various officials at the convention. When an official needed transportation, the supervisor would dispatch an employee with a claim check to the garage; the employee would then provide transportation for the official, and after so doing, return the claim check.

The employee in question had on several occasions that weekend performed this service of transporting dignitaries. In particular the employee took several persons to the train station on the last day of the convention. After his last trip, he did not return the claim check. Later that afternoon, he left Memphis and was driving south to a town about forty miles away when an accident occurred. His purpose in making this trip was to visit his fiancee.

The court held that the deviation did not defeat recovery. The court said:

> . . . [W]e agree that the retention of the claim check by Thomas [the employee], when the automobile was returned to the garage after the trip to the railroad station, was a retention of the constructive possession of the automobile itself.[36]

The court went on to add:

> It is our opinion that the words, "providing such use or operation is with the permission of the named assured," were intended to exclude from the protection of the policy a person who should take the automobile and use it without permission or authority in the first instance. If, however, the automobile covered by the policy is delivered to another for use, with the permission of the owner or insured, his subsequent use of it is with the permission of the insured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession.[37]

The *Stovall* case has been cited more than any other holding as authority for the liberal rule.[38] Clearly the language is a precise statement of what is regarded as the liberal rule; clearly this language led the authorities to cite *Stovall* as authority for the liberal rule.

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[36] 8 S.W.2d at 475.

[37] *Id.* at 477.

[38] 5 A.L.R.2d 600, 631.

However, in the subsequent Tennessee case of *Moore* v. *Liberty Mutual Insurance Company*,[39] the court indicated quite clearly that permission in the first instance would not assure coverage under the policy. In this case the employer gave his employee permission to take his truck for the purpose of hauling furniture belonging to his sister-in-law. There was only a small amount of furniture to be hauled, and it was to be hauled only two miles. Instead of hauling the furniture, the employee picked up a friend and together they drove thirty miles from town to a place where they drank whiskey and beer. Shortly thereafter the employee was involved in an accident which caused the death of his friend. The court handily distinguished the *Stovall* case:

> In the Stovall case, the driver, a traveling salesman with general custody of his employer's automobile, was held to be covered under the omnibus clause even though he used the car for a purpose not expressly authorized by his employer. In the Romines and Hubbard cases, the employer had given his employee only a limited permission to use the car for a particular purpose and it was held that no coverage was afforded under the omnibus clause when the employee materially departed from the scope of a granted permission. The cases turn upon the distinction of general custody and limited permission.[40]
>
> In the Hubbard case . . . this Court said: "The initial permission is not controlling where the use is limited to a specific purpose for a limited time and the driver takes the car for his own purposes and has an accident when using the car in a complete departure from any business of or permission by the owner."[41]

Finding the type situation described, the court held that the employee was not covered. Thus *Stovall,* the most cited authority for the liberal rule, is distinguished and the court finds that a deviation removes the employee from coverage.

The *Stovall* case and the subsequent development of the law indicate that the traditional classification of holdings is often based upon dicta, rather than the narrow holding, and it is submitted that, as was the case with the strict rule, the classification scheme obscures the circumstances to which courts look.

Further, conceding that the traditional classification might have had some value in the early days of omnibus clause interpretation when there were few and divergent opinions as to application of that clause, that value is lessened today because the vast majority of the courts follow the minor deviation rule. As the number of courts applying the minor deviation rule increases, the value of the traditional classification diminishes because that classification fails to indicate adequately the factors to which the courts look in determining whether a deviation is minor or substantial.

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[39] 193 Tenn. 519, 246 S.W.2d 960 (1952).

[40] *Id.* at 961.

[41] *Id.*

Finally, the traditional classification is in essence somewhat artificial. As the first omnibus clause cases appeared, the text writers began classifying the holdings. Later courts, faced with an omnibus clause question, then felt a need to align themselves somewhere within this scheme of classification. This, in turn, reinforced the classification. The concern over which rule to adopt seems to have obscured the necessity of looking behind the rule to the facts in order to determine the actual rationale of the various decisions.

VI. Philosophy of The Courts—Indicia to Which They Look

To criticize the traditional classification is not to suggest that the cases can be completely reconciled or tightly grouped into some other arrangement. It is, however, to suggest that closer scrutiny of the particular fact situation is a valuable supplement to the traditional classification.

The courts adjust the competing interests, i.e. the interest of the public, the insurance company, the employer and the employee, so as to produce what they consider an equitable result. All courts recognize that the public has some interest deserving of protection. The ultimate in protection of this interest would be strict adherence to the liberal rule. Few courts have followed this path. At some point, the deviation becomes so substantial that the courts seem to feel that the competing interests outweigh the public's interest. By and large the courts have gone about resolving this conflict of interest by measuring the deviation in much the same way that they would measure deviation from the scope of employment.[42] Thus, if the courts start with the proposition that the public is deserving of protection, the balance of interest quickly shifts when the deviation becomes substantial. At some point the interest of the insurance company and of the employer, and a reluctance to aid—or perhaps a desire to punish—the employee, outweigh the interest of the public.

In the adjustment of the interest of the parties there seem to be certain factors, often unarticulated, to which the courts look. Of course, no single factor is controlling, but an affirmative answer to the following questions will influence the court to find nonpermissive use. (1) Did the employee keep the car longer than authorized?[43] (2) Did the employee leave the general area in which he was authorized to use the car?[44] (3) Could the use of the car be termed a frolic rather than a more "normal" use?[45] (4) Was the person injured a passenger in the car and thus one who partook in the excursion (even though he may not have technically "assumed the risk") rather than an innocent third party?[46] (5) Was the operator intoxicated?[47] (6) Was the deviation the type which normally would not be anticipated? (7) Did the em-

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[42] 7 Blashfield § 315.12.

[43] Savage v. American Mut. Liab. Ins. Co., 158 Me. 253, 182 A.2d 669 (1962).

[44] Fisher v. Fireman's Fund Indem. Co., 244 F.2d 194 (10th Cir. 1957); Salitrero v. Maryland Cas. Co., 109 S.W.2d 260 (Tex. App. 1937).

[45] Moore v. Liberty Mut. Ins. Co., 193 Tenn. 519, 246 S.W.2d 960 (1952).

[46] Johnson v. American Auto. Ins. Co., 131 Me. 288, 161 A. 496 (1932).

[47] Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958).

ployee lie to his employer in securing permission to use the car? (8) Was the character of the employee such that the employer had no reason to expect a deviation from the permission granted?[48] (9) Did past practices indicate that the employer lent his car sparingly? (10) Did the employee violate the instructions of his employer?[49]

VII. Personal Use Versus Business Use

A final factor to which courts may look is whether the car was entrusted to the employee for business rather than a personal reason. It appears that the courts in the past and increasingly nowadays are influenced by the purpose for which the car was lent. Thus it appears that where the car was lent to the employee for his personal use, unconnected with his business activities, the courts will be much more willing to find permissive use than in the case in which the employee is given the car for business reasons. A consideration of the cases lends support to this distinction.

It seems clear that the courts are less tolerant of a deviation when the employee is performing a task for the employer. In *Johnson* v. *American Automobile Insurance*, discussed above, the employee was to wash and polish the car but went on a pleasure ride; the court held that the use was not permissive. Where an employee who was to drive to pick up his employer's children left his employer's home early to run a personal errand, it was held that the use was not permissive;[50] where an employee was directed to return his employer's car from a repair garage, but instead took a joyride, it was held that the clause did not cover the employee.[51] When a farmer lent a truck to an employee who lived nearby for the week, so that he could drive to work, and the employee drove several miles to town and drank whiskey, it was held that coverage did not obtain.[52] Where an employee was to make certain deliveries and deviated from his deliveries to drink beer and visit a friend, it was held that the use was without permission.[53] Where one turned his car over to another for repair and the repairman used the car for personal use, it was held that there was no permission within the meaning of the omnibus clause.[54] In one case an employee was sent to a nearby town to buy produce for his employer. He drank, visited and took the wrong road out of town. It was held that the use was not permissive.[55] Where a farmer lent an employee a truck so that he might

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[48] *See,* Employers Mut. Cas. Co. v. Poe, 191 So.2d 541 (1966).

[49] Byrne v. Continental Cas. Co., 301 Ill. App. 447, 23 N.E.2d 175 (1939); Farmers Mut. Auto. Ins. Co. v. Noel, 211 F. Supp. 216 (D.C. Mo. 1962); Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958).

[50] Powers v. Welks, 115 Pa. Super. 549, 176 A. 62 (1935).

[51] Speidel v. Kellum, 340 S.W.2d 200 (Mo. App. 1960).

[52] Farmers Mut. Auto Ins. Co. v. Noel, 211 F. Supp. 216 (D.C. Mo. 1962).

[53] Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958).

[54] Hartford Accid. & Indem. Co. v. Peach, 193 Va. 260, 68 S.E.2d 520 (1952).

[55] Phoenix Indem. Co. v. Anderson, 170 Va. 406, 196 S.E. 629 (1938).

return to work the next morning, and the employee drove to Mexico (from Texas) and was intoxicated at the time of the accident, it was held that the use was not permissive.[56] In the case in which an employee's normal function was to drive his employer's car to pick up the mail, and the employee deviated to see his mother and to do personal business, it was held that he was operating without the permission of his employer.[57] Similarly, where an employee was to drive a dump truck back and forth from one part of the plant lot to another, he was not covered by the omnibus clause when he left the plant grounds and went home in the truck.[58]

However, when a car is entrusted to the employee for personal use, the courts are more willing to find permissive use. Thus, where an employer lent his chauffeur the car to go to get a haircut, he was found to be covered by the omnibus clause in spite of the fact that he was gone several hours longer than he had promised and in spite of the fact that he went to see his sister rather than to get a haircut.[59] Similarly, when an employer lent an automobile to his employee after work so that the employee could go home to change clothes, and the employee stopped by several taverns on the way, the court held the clause covered the employee in spite of the fact that he had been told to hurry back.[60] When an employer granted an employee permission to take his car after work to go to the doctor and the employee did take the car but left too late to reach the doctor by closing time, and instead visited his mother, it was held that the use was permissive.[61]

There are, of course, cases in which the car was entrusted for a use personal to the employee and the court nevertheless found that the coverage of the policy did not extend. However, in these cases the deviation appears to be of a substantial nature. Thus, where the car was lent for an hour and a half and the employee kept the car more than nine hours, it was held that the use was not permissive.[62] Similarly, where an employer in Kansas lent his employee a car so that the employee might drive fifteen miles to visit his parents on Christmas Day and the employee took the automobile and was involved in an accident in Oklahoma, it was held that there was not permissive use.[63]

The recent Oregon case of *Ryan* v. *Western Pacific Insurance Company,* mentioned above, is an example of the tendency of the courts to look especially to the purpose for which the car was lent. In that case an employer offered his employee a car so that the employee could transport furniture. The employee was to return the truck the same afternoon if possible, and if not, the next day. The employee finished the moving job. Rather than return the truck, he drove to town for a

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[56] Salitrero v. Maryland Cas. Co., 109 S.W.2d 260 (Tex. Civ. App. 1937).

[57] Denny v. Royal Indem. Co. of N.Y., 26 Ohio App. 566, 159 N.E. 107 (1927).

[58] Boehringer v. Continental Cas. Co., 7 Wis. 2d 201, 96 N.W.2d 353 (1959).

[59] Jefson v. London Guar. & Accid. Co., 293 Ill. App. 97, 11 N.E.2d 993 (1937).

[60] Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924).

[61] Peterson v. Maloney, 181 Minn. 437, 232 N.W. 790 (1930).

[62] Savage v. American Mut. Liab. Ins. Co., 158 Me. 253, 182 A.2d 669 (1962).

[63] Fisher v. Fireman's Fund Indem. Co., 244 F.2d 194 (10th Cir. 1957).

[64] Ryan v. Western Pac. Ins. Co., 242 Ore. 84, 408 P.2d 84, 88 (1965).

few drinks and took in a show. The court considered the traditional classification, but felt that none was satisfactory and announced a rule which explicitly distinguishes the situation in which the car is entrusted for *business use* and the situation in which the car is entrusted for *personal use:*

> If the use is the same as that generally authorized—in the case of an employee, *personal use as distinguished from business use* —and the time and place of use do not represent a gross deviation from that authorized, the driver is a permissive user and covered under the omnibus clause. (Emphasis added)[64]

The *Ryan* case is especially important in Mississippi because the majority in *Watkins* quoted extensively from it and apparently felt that the distinction drawn between personal use and business use is relevant in deciding omnibus clause questions. In contrast to *Watkins,* where the car was entrusted for a personal use (to transport a calf), the employer in the *Poe* case lent the car to the employee not so that he could make a personal use of the car but for business motives (so that the employee could leave work and return without inconveniencing the employer).

Although there are many factors affecting a court's decision in omnibus clause cases, it appears that increasingly the courts are looking particularly to the purpose for which the car was entrusted. When the authorized use is a personal use, the courts seem much more tolerant of deviations than when the use is connected with business motives. The *Watkins* case indicates that this is the emerging position in Mississippi.

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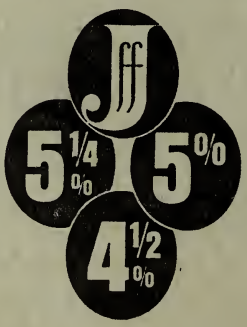

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